17-257

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 166.

GEORGE E. BOWDEN, RECEIVER OF THE FIRST NATIONAL BANK OF NORFOLK, VA., APPELLANT,

vs.

JACOB C. JOHNSON AND BETSEY VALENTINE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED JANUARY 5, 1880.

SUPREME COURT OF THE UNITED STATES.

No. 166.

GEORGE E. BOWDEN, RECEIVER OF THE FIRST NATIONAL BANK OF NORFOLK, VA., APPELLANT,

vs.

JACOB C. JOHNSON AND BETSEY VALENTINE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

INDEX.

	Original.	Print.
Appeal	1	1
Allowance	2	1
Citation and service	3	1
Bond	4	2
Bill	6	2
Affidavit to bill	11	4
Answer	12	5
Affidavit to answer	20	7
Replication	21	7
Deposition of George E. Bowden	23	9
William Lamb, direct	26	10
cross-examination	32	13
redirect	34	15
George Chamberlain, direct	37	16
cross-examination	39	17
redirect	45	20
George E. Bowden, recalled	46	20
W. H. Hunter, direct	47	21
cross-examination	50	23
redirect	52	24
Certificate of commissioner	53	24
Notice of taking depositions *de bene esse*	54	25
Commission	56	26
Deposition of Mrs. Betsey Valentine	75	36
Deposition of Mrs. Betsey Valentine, cross-examination	87	42
Opinion	90	43
Final decree	103	47

	Original.	Print.
Exhibit A 1, Lamb (letter of Johnson to Lamb)	69	33
B, Lamb (report of condition of bank on February 27, 1874)	69	33
C, Lamb (report of condition of bank on September 12, 1873)	71	34
Exhibit Bowden, No. 2 (certificate of authority of First National Bank of Norfolk	57	26
No. 1, organization certificate)	59	27
No. 3 (bank note and protest)	63	30
No. 4 (appointment of receiver)	65	31
No. 5 (directions to receiver to institute proceedings, &c	67	32
Certificate of clerk	104	47

1 Circuit court of the United States for the district of New Jersey.

GEORGE E. BOWDEN, RECEIVER, &c.,
vs.
JACOB C. JOHNSON & AL. } On bill.

The complainant, George E. Bowden, receiver, &c., hereby appeals to the Supreme Court of the United States from the decree of the circuit court in this cause, and from the whole of said decree, because, as he alleges, the said decree is contrary to law, erroneous, and void; and he prays that a transcript of the bill, answer, and other proceedings in the cause may be transmitted to the said Supreme Court, and that a citation to the defendants may be issued, citing them to be and appear at the said Supreme Court, at the city of Washington, on the 13th day of October, A. D. 1879, to do and receive what may appertain to justice to be done in the premises.

THOMAS D. HOXSEY,
Sol'r for Complainant.

2 GEORGE E. BOWDEN, RECEIVER FIRST National Bank of Norfolk, Virginia,
vs.
JACOB C. JOHNSON ET AL.

Upon the prayer of the complainant an appeal is allowed from the decree entered in this cause on the 16th day of January, 1879, to the Supreme Court, upon his, or some one for him, executing a bond in penalty of $250, conditioned as the law directs.

3 *Citation.*

To Jacob C. Johnson and Betsey Valentine:

Whereas George E. Bowden, receiver of the First National Bank of Norfolk, Virginia, has lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of New Jersey, on the 16th day of January, A. D. 1879, made in favor of you, the said J. C. Johnson and Betsey Valentine, and has filed the security required by law, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the 13th day of October, A. D. 1879, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Trenton, in the district of New Jersey, in the third circuit, this 10th day of October, A. D. 1879.

JNO. T. NIXON,
One of the Judges of the Circuit Court of the United States for the District of New Jersey, in the Third Circuit.

UNITED STATES OF AMERICA,
District of New Jersey, ss:

Robert L. Hutchinson, U. S. marshal, being duly sworn, saith that on the tenth day of October, A. D. 1879, he served on Thomas N. McCarter, esq., solicitor for defendants in the case of George E. Bowden, receiver of

the First National Bank of Norfolk, Virginia, against Jacob C. Johnson and B. Valentine, a copy of the within citation by leaving said copy with the said Thomas N. McCarter.

R. L. HUTCHINSON,
U. S. Marshal.

Sworn and subscribed before me this 11th day of October, A. D. 1879.
[NOTARIAL SEAL.] F. C. LOWTHORP, JR.,
Notary Public of N. J.

(Indorsed:) United States circuit court, district of New Jersey. George E. Bowker, receiver, &c., vs. Jacob C. Johnson & als. Citation on appeal. Thos. D. Hoxsey, sol'r. Fee, $5.00.

4 *Bond.*

Supreme Court of the United States.

GEORGE E. BOWDEN, RECEIVER OF THE FIRST National Bank of Norfolk, Virginia,
vs.
JACOB C. JOHNSON AND BETSEY VALENTINE.

Know all men by these presents that I, Orson Adams, of Howard County, in the State of Maryland, am held and firmly bound unto the said Jacob C. Johnson and Betsey Valentine, of the State of New Jersey, in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to them, their executors or administrators; to which payment, well and truly to be made, I bind myself, my heirs, executors, or administrators, firmly by these presents. Sealed with my seal and dated this 10th day of October, A. D. 1879.

Whereas the above-named George E. Bowden, receiver as aforesaid, hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree entered in the above-entitled cause by the circuit court of the United States for the district of New Jersey, on the 16th day of January, A. D. 1879:

5 Now, therefore, the condition of this obligation is such that if the above-named George E. Bowden, receiver as aforesaid, shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

ORSON ADAMS. [SEAL.]

The foregoing appeal bond is hereby approved and ordered to be filed.
JNO. T. NIXON, *Judge.*

6 *Bill.—Filed December* 13, 1876.

In the circuit court of the United States for the district of New Jersey.

To the honorable the judge of the said court, sitting in equity:

George E. Bowden, of Norfolk, Virginia, and a citizen of the State of Virginia, receiver of the First National Bank of Norfolk, of the said State,

duly appointed and qualified under the laws of the United States, brings this his bill against Jacob C. Johnson and Mrs. B. Valentine, citizens of the State of New Jersey, and thereupon your orator complains and says that the said First National Bank of Norfolk, Virginia, heretofore, to wit, on the thirty-first day of December, A. D. 1864, was an association duly organized and authorized to commence business under and pursuant to the provisions of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States stock, and to provide for the circulation and redemption thereof," approved February 25th, A. D. 1863.

That, being so organized as aforesaid, the defendant, Jacob C. John-
7 son, afterwards, to wit, on the 10th day of January, A. D. 1870, became the purchaser and owner of 130 shares of the capital stock of the said association, of one hundred dollars each, transferable only on the books of the said association, whereby, and in consideration whereof, the said Johnson then and there assumed and promised to comply with all the obligations imposed by law and the by-laws of the said association as incident to the ownership of the capital stock of the said association. That afterwards, to wit, on the 26th day of May, A. D. 1874, the said association failed to redeem one of its circulating notes of the denomination of ten dollars, and was in default in the payment of its circulating notes generally, whereupon, on the 3rd day of June, in the year last aforesaid, your orator was duly appointed by the Comptroller of the Currency a receiver to take charge of the assets and to wind up and settle the affairs of the said association.

Your orator would further represent that some time in the month of January, A. D. 1874, the defendant Johnson visited the city of
8 Norfolk for the purpose of enquiring and examining into the condition of affairs of the said association; that the said Johnson becoming satisfied from the enquiries and examinations made by him, and from other information in relation to said bank, that the affairs of the said association were in a critical condition (as in fact they were), and that a suspension of the bank was inevitable, the said Johnson returned to New Jersey and immediately thereafter, to wit, on the 15th day of January, 1874, in order to exonerate himself from liability to the creditors of the said association by reason of his ownership of the said 130 shares of its capital stock, transferred or *or* caused to be transferred in due form on the books of the said association to one Mrs. B Valentine, defendant herein, the said 130 shares owned by him as aforesaid. Your orator is informed and so charges that said pretended transfer was made without legal consideration, and with a view of exonerating the said Johnson from his liability as a stockholder as aforesaid; that the said defendant Mrs. B

Valentine is and was well known by the said Johnson at the time
9 of said pretended transfer to be utterly insolvent; that said pretended transfer was made with a view of defrauding the creditors of the said association, and therefore was and is utterly null and void.

Your orator further represents that the assets of the said association will fall far short of paying off and discharging the debts of the said association, and that therefore the Comptroller of the Currency having so determined in order to provide for the payment of said debts on the 13th day of August, A. D. 1875, directed your orator, as receiver aforesaid, to proceed to enforce the whole of the personal liability of all persons owning

the capital stock of the said association on the said 26th day of May, A. D. 1874.

The said pretended transfer of the said 130 shares of the said capital stock being evidenced by formal assignment on the books of the said association, your orator is advised to invoke the aid of a court of equity to set aside said pretended transfer, and to enforce the personal liability of the said Johnson as the owner of the said 130 shares of stock.

Inasmuch, therefore, as your orator is remediless save in a court
10 of equity, where matters of this sort are properly cognizable and relievable, he prays that the said Jacob C. Johnson and Mrs. B Valentine may be made parties defendants to this bill, and be required to answer its allegations on oath; that the said pretended transfer of the said 130 shares of stock from the said Johnson to the said Valentine may be set aside, and that the said Jacob C. Johnson may be decreed to pay your orator, as receiver aforesaid, the par value of the 130 shares of the capital stock of the said association owned by him as aforesaid, and for such other and further relief, general and special, as the nature of the case demands, and is agreeable to equity and good conscience. May it please your honors to grant unto your orator the most gracious suit of subpœna of the United States of America, to be directed to the said Jacob C. Johnson and B Valentine, thereby commanding them personally to be and appear before your honors in this honorable court at a certain day, and then and there to answer all and the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet; and your orator will ever pray.

11 THOMAS D. HOXSEY,
Soli'r, and of Counsel with Complainants.

STATE OF VIRGINIA, *ss:*

George E. Bowden, being duly sworn according to law, on his oath saith that the facts, matters, and things set forth and contained in the above bill of complaint are, so far as the same relate to his own acts and doings, true, and so far as they relate to the acts and doings of others he believes them to be true; and the said deponent further saith that he hath been duly appointed receiver of the First National Bank of Norfolk, in said State of Virginia, and qualified under the laws of the United States, and has entered upon the duties appertaining thereto.

G. E. BOWDEN.

Sworn and subscribed before me this 28th day of November, A. D. 1876.

[SEAL.] H. C. PERCY,
Notary Public for the City & County of Norfolk, State of Virginia.

Filed December 13, 1876.

12 *Answer. Filed March* 21, 1877.

In the circuit court of the United States for the district of New Jersey.

BETWEEN GEORGE E. BOWDEN, COMPLAINANT,
and
JACOB C. JOHNSON AND BETSEY VALENTINE, defendants.
} Answer.

The joint and several answer of the defendant', Jacob C. Johnson and Betsey Valentine, to the bill of complaint of George E. Bowden, complainant.

These defendants, now and at all times hereafter, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors, uncertainties, and untruths in the complainant's bill of complaint contained, for answer thereto or unto so much and such parts thereof as these defendants are advised is material for them to make answer unto, they answer and say:

That they believe it to be true that the First National Bank of Norfolk, Virginia, was, on or about the time for that purpose in the said
13 bill mentioned, an association duly organized and authorized to commence business under and pursuant to the provisions of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof." And these defendants further admit it to be true that this defendant, Jacob C. Johnson became the purchaser and owner of one hundred and thirty shares of the capital stock of the said association, of one hundred dollars each, and say that the time of such purchase was some time in the year eighteen hundred and sixty-nine, but these defendants deny that in consideration thereof, this defendant Jacob C. Johnson, assumed and promised to comply with any obligation imposed by law and the by-laws of said association as incident to the ownership of the capital stock of said association, except so far as any obligation was by law imposed upon him as owner of said stock.

And these defendants, further answering, say that they do not know, except as alleged in said bill of complaint, whether said association,
14 on the twenty-sixth day of May, eighteen hundred and seventy-four, failed to redeem any of its circulating notes, or, if so, of what denomination the said notes so unredeemed were, or whether the said association was or not in default in the payment of its circulating notes generally, as alleged in said bill of complaint, but these defendants leave the said complainant to make such proof thereof as may be in his power. Nor have they any knowledge, except from the allegations contained in said bill of complaint, whether, on the third day of June, eighteen hundred and seventy-four, the complainant was duly appointed by the Comptroller of the Currency a receiver to take charge of the assets and to wind up and settle the affairs of the said association; and these defendants ask that the complainant may be required to make strict and legal proof of the truth of said allegations.

And these defendants, further answering, deny that this defendant Jacob C. Johnson visited Norfolk in the month of January, eighteen hun-

dred and seventy-four, as stated in said bill, but admits that he did
15 visit the said city of Norfolk in the month of November, eighteen hundred and seventy-three, but not for the purpose of inquiring and examining into the condition and affairs of said association; and they further deny that this defendant Jacob C. Johnson, on the said visit, became satisfied, from the enquiries and examinations alleged to have been made by him, or from any other information in relation to the said bank, that its affairs were in a critical condition, and that a suspension of the said bank was inevitable; but to the contrary of said allegations these defendants say that the defendant Jacob C. Johnson went to Norfolk in the said month of November, eighteen hundred and seventy-three, for the purpose of inspecting a farm which it was purposed to exchange with this defendant Jacob C. Johnson for his said stock. And this defendant Jacob C. Johnson denies, of his own knowledge, and the said defendant Betsy Valentine on information and belief, that the said Jacob C. Johnson then during that visit, or at any other time, saw anything in the condition of the said bank, except that William Lamb, who
16 was at that time the president of the said bank, and who went with this defendant Jacob C. Johnson to inspect the farm aforesaid, at the same time proposed that this defendant should loan to the said association the sum of twenty-five thousand dollars, and proposed to secure the said loan by mortgage on the real estate of the said bank, which loan this defendant declined to make; and this defendant Jacob C. Johnson admits that on the fifth day of December, eighteen hundred and seventy-three, and not on the fifteenth day of January, eighteen hundred and seventy-four, as stated in said bill, this defendant sent his said stock to the said bank with the power and direction to have the same transferred to the said defendant Betsy Valentine; but he denies expressly that such transfer was made in order to exonerate himself from liability to the creditors of the said association by reason of his ownership of the said one hundred and thirty shares of said capital stock; and these defend-
17 ants are informed that the actual transfer of said stock upon the books of the said association as directed by this defendant Jacob C. Johnson, on the fifth day of December, eighteen hundred and seventy-three, was delayed for some time without the knowledge and against the will of these defendants; and these defendants deny that the transfer of said stock was made without legal consideration or with any view to exonerate the said Jacob C. Johnson from liability as stockholder aforesaid; and they also deny that the said defendant Betsy Valentine is or was at the time of said transfer known by said Jacob C. Johnson to be utterly insolvent, or that such transfer was made with a view of defrauding the creditors of such association, but on the contrary these defendants assert that it is not true that the said Betsy Valentine was at the time of said transfer insolvent, or that the said transfer was made for any such purpose as in the said bill alleged, but was made in good faith and for a valuable and lawful consideration. And these defendants, further*ing* answer-
18 ing, say that they have no knowledge, except from the allegations in the said bill of complaint, that the assets of said association will fall short of paying off and discharging the debts of said association, or whether the Comptroller of the Currency has so determined or has directed, in order to provide for the payment of said debts, that the complainant,

as receiver, shall proceed to enforce the whole of the personal liability of all the persons owning capital stock of the said association on the twenty-sixth day of May, eighteen hundred and seventy-four.

And these defendants deny that the said Jacob C. Johnson was one of the owners of the said capital stock of the said association on the twenty-sixth day of May, eighteen hundred and seventy-four; and this defendant Jacob C. Johnson say' that some time about the fifteenth day of April, in the year eighteen hundred seventy-four, he received a statement of the assets and liabilities of the said bank, by which it appeared and was represented to this defendant that the said bank was entirely solvent
19 and able to pay all its liabilities; and this defendant had no reason to doubt, and did not doubt but that the said statement was entirely correct and true, and that if the said complainant as receiver of said bank (if he be such receiver), shall fully and justly and fairly administer the assets of the said bank which should have come to his hands as receiver, it will be entirely unnecessary to call upon the said stockholders, or either of them, to pay up the whole of their stock, or any part thereof; and these defendants deny that any other matter or thing in said bill of complaint contained, and not herein and hereby well and sufficiently answered, is true, to the knowledge and belief of these defendants, all which matters and things these defendants are ready to aver, maintain, and prove as this honorable court shall direct; and they pray leave to refer themselves to a copy of the said balance-sheet which is hereby annexed, and that the same may be taken as and for part of this answer; and that they
20 may be hence dismissed with their reasonable costs and charges most wrongfully sustained.

THOMAS N. McCARTER,
Sol'r, & of Counsel with Def't.

UNITED STATES OF AMERICA,
District of New Jersey, ss:

Jacob C. Johnson and Betsy Valentine, the defendants named in the foregoing answer, being by me duly sworn, on their oaths say that the facts, matters, and things in the said answer contained, so far as relate to their own acts, respectively, are true; and so far as relate to acts of others, they believe them to be true.

JACOB C. JOHNSON.
BETSY VALENTINE.

Sworn and subscribed the 19th day of March, A. D. 1877, before me, at Newark, in the district of New Jersey.

W. H. FRANCIS,
United States Commissioner.

Filed March 21, 1877.

21 *Replication.—Filed March* 27, 1877.

Circuit court of the United States for the district of New Jersey.

BOWDEN *vs.* JOHNSON & AL. } On bill and answer.

The replicant, saving and reserving unto himself all and all manner of

exception and advantage to the manifold insufficiency of the said answer, for replication thereunto saith that *that* he will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that said answer of the defendants is uncertain and untrue, insufficient to be replied to by this replicant; without this, that any other matter or thing whatsoever in said answer contained material or effectual in the law to be replied to, confessed, or denied as true. All which matters and things this replicant is and will be ready to aver and prove as this honorable court shall direct, and humbly pray as in and by his said bill, as he has already prayed.

THO. D. HOXSEY,
Sol'r, and of Counsel with Complainant.

Filed March 27, 1877.

22 U. S. circuit court for the district of New Jersey.

BETWEEN GEORGE E. BOWDEN, RECEIVER, COMplainant, *and* JACOB C. JOHNSON AND BETSEY VAL'TINE, DEfendants.	In equity. On bill, &c.

TESTIMONY.

Thos. D. Hoxsey, sol'r of complainant; T. W. McCarter, sol'r of defendants.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

Be it remembered that on the 19th day of April, A. D. 1877, before me, a commissioner appointed by the circuit court of the United States, within and for the eastern district of Virginia, in the fourth circuit, by virtue of the act entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," at my office in the custom-house, in the city of Norfolk, and State of Virginia, and within the said district, between the usual hours of business, were produced and personally came before me George E. Bowden, George Chamberlain, and William Lamb, witnesses on behalf of the plaintiff, to depose in a civil cause depending in the circuit court of the United States for the district of New Jersey, held at Trenton, in said district, in the chancery side of said court, wherein George E. Bowden,
23 receiver of the 1st National Bank of Norfolk, Virginia, is plaintiff, and Jacob C. Johnson and Mrs. B. Valentine, defendants, in a suit in equity, and whose testimony is alleged to be material and necessary in said civil cause in behalf of the plaintiff. And said George E. Bowden, George Chamberlain, and William Lamb, being of sound mind, and being by me first carefully examined, cautioned, and duly sworn on their respective corporal oaths to testify the whole truth touching the matters in controversy in said civil cause, respectively depose and say as follows:

Deposition of George E. Bowden, witness produced and sworn as aforesaid on behalf of the plaintiff.

My name is George E. Bowden; my age, 25 years; my residence, 152 Freemason street, Norfolk, Virginia; and my occupation, clerk.

1. Q. Are you the receiver of the First National Bank of Norfolk, of Virginia?

A. I am.

2. Q. Have you copy of the organization certificate of the 1st National Bank of Norfolk, and of the written authority of the Comptroller of the Currency to commence business; if so, please produce them, and if you havn't them, where are they?

A. They are now in Baltimore, where they were left in the hands of Judge Giles, before whom a case was tried. They have been telegraphed for, and will be here to-morrow. They will be filed before the closing of these depositions.

3. Q. When and by whom were you appointed receiver of the First National Bank of Norfolk?

A. On the 3d day of June, 1874, by John Jay Knox, Comptroller of the Currency.

4. Q. Were you appointed by written authority of the Comptroller of the Currency; if so, produce your appointment, if you have it; if not, please say where it is?

24 A. I was appointed in writing; my appointment is with the other papers referred to with Judge Giles; it will be filed, or a certificate copy of it, with these depositions, before the same are completed.

5. Q. Have you received any instructions from the Comptroller of the Currency touching the enforcement of the personal liabilities of the stockholders of said bank; if so, please state what those instructions were?

A. I have; I received instructions to enforce the whole of the personal liability of the stockholders of the First National Bank of Norfolk. The written instructions are with the other papers in the hands of Judge Giles; these instructions were received from John Jay Knox, Comptroller of the Currency.

(The defendant, J. C. Johnson, by his counsel, T. S. Garnett, jr., objects to questions 1, 2, 3, 4, and 5, and the answers of the witness thereto, on the ground that the said answers are not the best evidence of the facts therein inquired into, and requires the production of the written evidence in the said answers referred to.

To which objection the plaintiff, by his counsel, replies:

That the papers in the said questions and answers referred to, were, during the past week, placed in the hands of one of the United States circuit judges for the district of Maryland, in a cause tried in the U. S. circuit court, at Baltimore, between this complainant, as plaintiff, and a stockholder of the 1st National Bank of Norfolk, Va.

That said papers have been written and telegraphed for since the decision of said cause, and are expected here in the mail to-morrow morning, and

25 That the complainant reserves the right to file said papers, or duly certified copies with this deposition before the same is closed.)

6. Q Have you at any time received verbal instructions from the Comptroller of the Currency upon the subject referred to in the preceeding question; if so, what where those instructions, and when and where did you receive them?

(Defendant, J. C. Johnson, by his counsel, objects to this question on the ground that the written evidence referred to by the witness is the best evidence what those instructions were.)

A. I have received verbal instructions given just prior to the receipt of the written instructions in August, 1875; I think by the Comptroller in Washington. They were of like tenor with the written instructions.

7. Q. Please say whether you have with you the stock ledger of the 1st National Bank of Norfolk, Va.?

A. I have.

8. Q. Please refer to the said ledger, and give the date of the transfer of one hundred and thirty shares of the capital stock of the said bank by the defendant, Johnson, to the defendant, Valentine?

A. By reference to the stock ledger it appears that the transfer referred to was made on the 15th day of January, 1874.

9. Q. At what time did said bank suspend?

A. On the 26th day of May, 1874. I think it was on that day that a ten-dollar circulating note of said bank was protested for non-payment, by W. H. Hunter, notary public; copy of said protest will be filed with the other papers referred to before the closing of this deposition.

The cross-examination of the witness is reserved by counsel for
26 defendant, J. C. Johnson, until his offer to produce the written evidence referred to by him in his direct examination is made; and further this deponent saith not.

G. E. BOWDEN. [L. S.]

Subscribed and sworn to before me this 19th day of April, A. D. 1877.

CHAS. T. BARRY,
U. S. Commissioner.

WILLIAM LAMB, witness produced and sworn as aforesaid on behalf of the plaintiff:

My name is William Lamb; my age is 41 years; my residence No. 10 Bute street, Norfolk, Virginia; and my occupation ship broker.

1. Q. Please state whether or not you were officially connected with the 1st National Bank of Norfolk; if so, for how long a time, and in what capacity?

A. I was a director and its president from 1867 to some time in April, 1874.

2. Q. Are you acquainted with defendant, Johnson?

A. I am.

3. Q. Please state whether or not the said defendant, in the month of November or December, 1873, visited Norfolk; and, if so, please state as nearly and as fully as you can the object of his visit?

A. In the latter part of 1873, owing to the straightened condition of the 1st National Bank, I was anxious to make a loan on its real estate, and I wrote to Mr. C. L. Cole, the former president, then living in New York, to assist me in doing so. He wrote me that he had a friend, Mr.

J. C. Johnson, whom he thought was able to make the loan, and who would do so if proper representation could be made to him. He wrote me that he would bring Mr. Johnson down to Norfolk, when I could talk to him upon the subject. Some time, I think, in November, 1873, Mr. Johnson came to Norfolk with Mr. Cole, when I endeavored to get him to make a loan on the banking building of the 1st National Bank. I told him that the need of a loan was urgent; that I thought the security was good, and I appealed to him as a stockholder to make the loan. He promised when he returned to look into his affairs, and if he could conveniently do so promised to make the loan.

27

While Mr. Johnson was here I rode out with him to see a farm on the Southern Branch, which, I think, he examined with a view of purchasing for himself or for some friend.

4. Q. During Mr. Johnson's stay in Norfolk, please state, fully as you can, all the conversation, if any took place between you and himself relative to the loan you say you requested him to make, and as to the general affairs and condition of the 1st National Bank of Norfolk.

A. I cannot remember any of the details of the conversation, nor the full extent given him by me as to the condition of the bank, but my impression is that I called attention to the fact that our capital had been seriously impaired by the Elkton suit, and other litigation, and that the panic had caused us to lose business and be very hard up, and the necessity of having ready money to retain our business and to recover our position. I think I asked for a loan of twenty-five thousand dollars on the building. My commission was of such a confidential character as I would have only had with one largely interested in the bank.

5. Q. In that confidential conversation, did you state to him, or have him understand, that loan was necessary in order to avert further embarrassment on the part of the bank?

(Defendant's counsel objects to this question, on the ground, 1st, that no particular conversation, nor the time or place of any, has been spoken of by the witness; and, 2nd, that the question is a leading one.)

28

A. As I said before, I cannot remember the details of the conversation, but urged the loan by him on the ground that it was urgently needed.

6. Q. Please state whether or not, during Mr. Johnson's stay in Norfolk, on the occasion you refer to, you took any steps to inform him as to the status of the bank, as shown by its books and papers, and whether or not he made any examination into the same, with a view of informing himself as to the financial status of the bank?

A. I don't remember whether he examined the books and papers of the bank, but I know that I expected and desired him to make all proper inquiries which he had a right to do as a stockholder into the condition of the bank.

7. Q. Did he make any or converse any with you upon the subject?

A. My impression is that I gave him a general idea of the condition of the bank when making a request for the loan, but I expected him to get the details from the cashier or other officers of the bank.

8. Q. From Mr. Johnson's conversation with you at that time, did you form the opinion that he visited Norfolk with a view of ascertaining the condition of the bank?

(Defendant, J. C. Johnson, by his counsel, objects to this question, on the ground, 1st, that no particular conversation nor the time nor place of any has been spoken of by the witness; and, 2nd, that the witness is asked a mere expression of opinion.)

29 A. I was under the impression that Mr. Johnson was brought to Norfolk by Mr. Cole to look into the matter of making us a loan, and was disappointed that Mr. Johnson went away without consummating it.

9. Q. Did Mr. Johnson purchase the farm which you in a preceding answer have stated that he inspected during his stay in Norfolk?

A. I have no knowledge of it.

10. Q. In a preceding answer you have referred to what you call the "Elkton suit," and other litigation, in which your bank was involved. Please state how and to what extent the result of the "Elkton suit" affected the interests of your bank.

(J. C. Johnson, defendant, by his counsel, objects to this question as being irrelevant to the issue joined in this suit.)

A. It very seriously impaired the capital of the bank. I cannot remember the figures exactly, but I think it destroyed about half of the capital stock.

11. Q. Where was that suit brought and what was its nature?

(Objected to on the ground that it is incompetent for the witness to testify as to this suit without the production of the record therein.)

A. It was brought by the First National Bank of Elkton, Ind., which laid its damages against us at $100,000.00; we were under the impression that this bank owed us a large balance; after long and expensive litigation they obtained a judgment against us for $30,000.

12. Q. Did your bank make any counter-claims in that suit; and if so, what was the result?

(Objected to, on the same ground stated immediately above.)

30 A. It is my impression that we were suing the bank for some $16,000 and interest, when they brought the suit against us.

13. Q. Were any portion of those counter-claims allowed?

(Objected to as before.)

A. My recollection is that a very small part, if any, were allowed.

14. Q. What was the capital stock of the First National Bank of Norfolk?

A. One hundred thousand dollars.

15. Q. At the time of Mr. Johnson's visit to Norfolk, what was his reputation, financially?

A. I believed him to be a gentleman of considerable means.

16. *Q.* Do you know the reputation in that respect of the defendant, Mrs. B. Valentine?

(The defendants, by counsel, object to this question as well as to the question immediately preceding and the answer thereto, on the ground that the matter of reputation cannot be inquired into in this proceeding.)

A. I know nothing, except what I heard from Mr. Cole who wrote me that she was a lady whose husband was without means.

17. Q. What was the final result of your negotiations with Mr. Johnson, relative to the loan you say he was requested to make to the bank?

A. Early in December, 1873, I received a letter from Mr. Johnson, in

which he said that his partner in California needed all his available funds in the business, and that he could not make the loan; in the same letter he requested me to convey his stock in the First National Bank to his sister, Mrs. Valentine.

18. Q. Have you that letter; if so, please produce it?

31 A. I have, and it is herewith produced. (Witness produces the letter referred to, and it is filed, marked Exhibit A.)

19. Q. Did or did not that letter contain the first instruction touching the transfer of the stock in question to the defendant, Mrs. Valentine?

A. It did, and contained the certificate of stock with a power of attorney to transfer it.

20. Q. Did you make the transfer; and if so, when?

A. I did not make the transfer immediately. The stock ledger of the bank will show the date. By reference to the stock ledger I find the transfer was made on the 15th of January, 1874.

21. Q. Why did you hesitate or delay in making the transfer as directed?

A. I was very much disappointed at not getting the loan, and the continued stringency of the bank caused me so much anxiety that in the failure to get the loan I thought it would be necessary to make an immediate assessment upon the stockholders of 50 per cent. I therefore felt unwilling to transfer the stock until I was satisfied of the solvency of the party to whom it was to be transferred; I therefore wrote to Mr. Cole to enquire about Mrs. Valentine and awaited his reply before making the transfer.

22. Q. Were you satisfied of the solvency of the transfer of the stock, and what caused or induced you finally to make the transfer?

A. I was not satisfied from Mr. Cole's reply, but after obtaining legal advice I found that I had no right to refuse the transfer, and therefore transferred it from Mr. Johnson to Mrs. Valentine on the 15th of January, 1874.

23. Q. Please state the date on which the last dividend on the capital stock of the First National of Norfolk was declared.

A. It is my impression that the last dividend was declared in 1872, by special permission of the Comptroller of the Currency.

32 24. Q. What was the amount of that dividend?

A. I think it was three per cent.

25. Q. What was the date of the dividend declared before that, and how much was it?

A. I don't recollect the date. I think the amount was three per cent.

Cross-examination:

1. Q. In your answer to the 21st question in your examination-in-chief you say, among other things, that you wrote to Mr. Cole to enquire about Mrs. Valentine, and awaited his reply, &c. Where is your letter to Mr. Cole, what is the date thereof, and where is his reply thereto and the date thereof?

A. My communication to Mr. Cole and his reply are appended to the letter I received from Mr. Johnson, which is filed in evidence; there is no date of these notes, but they were written and received during the month of December, 1873.

2. Q. How often was the bank required to make and publish statements of its condition and business?

A. Formerly quarterly, but during the latter portion of the existence of the bank at irregular periods of about three months.

3. Q. What was the date of the last report of its condition?

A. I think there was a report made after I resigned as president of the bank, some time in April or May.

4. Q. What was the date of the last report made during your presidency of the bank?

A. I do not remember, but think it was in January or February, 1874.

5. Q. What was the date of the report of its condition next preceeding the last report referred to?

A. About three months before.

6. Q. Have you any printed copy thereof or written copy?

33 A. I don't think I have preserved any copies; they can be found among the papers of the bank unless lost or destroyed. These published statements do not show the suspended and bad debts of the bank, as were shown on the semi-weekly statements made to the directors.

(The counsel for defendant, J. C. Johnson, calls for a printed copy of the report of the condition of the bank, referred to in questions 5th and 6th, and the answer thereto, and if not produced reserves the right to file a copy thereof before the closing of these depositions.)

7. Q. Did you take any steps to satisfy yourself that the answer of Mr. Cole, to your letter referred to in the 1st cross-question, and your answer thereto, was a true and correct statement?

A. I do not recollect of having sought any further information, for not long after receiving it I felt it my duty to make the transfer as president.

8. Q. In you answer to the 17th question you say he (Johnson) requested me to convey his stock in the First National Bank to his sister Mrs. Valentine. Do you not know that the said letter of Mr. Johnson does not mention Mr. Valentine as his sister, and that she is not his sister?

A. I did not mean it as a quotation from the letter; I was under the impression that Mrs. Valentine was Mr. Johnson's sister, and used the expression more particularly to designate her. I do not know that she is not his sister.

9. Q. Do you know whether any relationship exists between them?

A. I do not.

10. Q. Did Mr. Johnson visit Norfolk during the month of January, 1874, as alleged in the complainant's bill?

A. Not to my knowledge.

34 11. Q. In your answer to question 7, examination-in-chief, you state your impression that you gave him a general idea of the condition of the bank. Do you remember distinctly how you did this?

A. It was customary for a semi-weekly statement of the condition of the bank to be made up by the general ledger bookkeeper, which statements gave a very good idea of the condition of the bank, much fuller than the published statements, and when interested parties came in to examine the condition of the bank, these were usually shown, and any questions answered that might be asked, either by myself or a reference to the cashier and bookkeeper. I suppose I must have shown these statements to Mr. Johnson, but whether I went into particulars or left it with the cashier, bookkeeper, or Mr. Cole, who was familiar with the bank, I cannot remember.

Re-examination:

1. Q. Please state the nature of the report referred to in your answer to the 5th question asked you by the counsel for defendant, and state to what extent said report indicated the true condition of the bank.

A. The published reports profess to be a correct statement of the condition of the bank at the close of business on a certain date; it gives the assets and liabilities of the bank. Among its assets are notes and bills discounted, and the amount of these notes and bills are put down at their face value as good assets, although many of them may be actually worthless. In the reports to the comptroller the bad debts and suspended paper among notes and bills are separately indicated.

2. Q. How did the semi-weekly reports referred to by you in answer to question 11; cross-examination, differ from the published reports referred to by you in your last answer?

A. They showed the condition of the bank in a much plainer way, and, if thoroughly understood, must have shown that the bank was in a bad condition.

35 3. Q. Between the date of Mr. Johnson's visit and the suspension of the bank, did its condition improve or grow worse?

A. It grew worse.

4. Q. Please state, as fully as you can, what was the financial condition of the bank in November and December, 1873.

A. The capital stock was worthless and, as some of it was being carried by the bank, unless it could be floated and the business of the bank restored, the bank could not pay its depositors. As our business had been very good before the panic, I hoped some capitalist would take the stock and resuscitate the bank, which could easily have been done with a comparatively small amount of cash.

5. Q. As things at that time stood, was the bank, in your judgment, solvent or insolvent?

A. I felt that unless the necessary aid was given that it would fall into the hands of a receiver and prove insolvent.

6. Q. After the transfer of the stock from Mr. Johnson to Mrs. Valentine, did you forward the certificate to Mrs. Valentine; if so, how and when?

A. My recollection is that, in a letter dated Feb'y 14, written about one month after the transfer, I enclosed the certificate of stock to Mr. Johnson, for Mrs. Valentine, a lead pencil copy of which letter is on the back of Exhibit A, filed with this deposition.

7. Q. Did you mail that letter?

A. My recollection is that I mailed the letter.

(A copy of said letter written in ink is herewith filed, marked Exhibit A, 1 Lamb.)

8. Q. In the months of November and December, 1873, how many shares of the capital stock of the First National Bank of Norfolk stood in your name on the books of the bank?

36 (Objected to by defendants' counsel as irrelevant and immaterial.)

A. Two hundred and odd shares, I have forgotten exactly.

9. Q. At that time, please say whether you were solvent or insolvent?

(Objected to, as immediately before.)

A. Subsequent events show that I was insolvent at that time.

10. Q. At that time please state, as nearly as you can, what was the amount of your liabilities to the bank.

(Objected to by defendants' counsel, on the ground that such evidence is immaterial, irrelevant and entirely foreign to the issue in this suit.)

A. Outside of what I was on for stock notes, I think I owed as maker and endorser, about ($30,000) thirty thousand dollars.

11. Q. For what amount were you liable on stock notes?

A. I have forgotten the amount, but think it was about twenty thousand dollars, principally as endorser.

12. Q. Please state whether or not the paper upon which you were liable as maker, endorser, or otherwise, was in the bank in the months of November or December, 1873.

A. I think some of it was re-discounted by northern banks, in order to make our bank easy. I can't recollect how much.

(Objected to, both question and answer, by defendants' counsel, on the ground given above.)

37 Cross-examination resumed:

1. Q. In your answer to the 5th question in your redirect examination, you state that you felt that unless the necessary aid was given, it (the bank) would fall into the hands of a receiver, and prove insolvent. Do you not mean to say that the solvency of the bank was a question not then determined in your own mind?

A. I hoped up to the day before the closing of the bank, that its business would be resus'itated and the solvency of the bank secured. From the panic in September, or soon thereafter, which caused my pecuniary embarrassment, I felt the bank would be insolvent without this outside aid; up to that time I felt able with my own credit to protect its solvency.

2. Q. Did then the solvency of the bank depend upon the preservation of your own individual credit?

A. It did at that time without other assistance.

3. Q. Was not this fact known only to yourself?

A. I am of that opinion.

And further this deponent saith not.

WILLIAM LAMB.

Subscribed and sworn to before me, this 19th day of April, A. D. 1877

CHAS. T. BARRY, [L. S.]
U. S. Commissioner.

GEORGE CHAMBERLAIN, witness, produced and sworn as aforesaid on behalf of the plaintiff.

My name is George Chamberlain, my age is 43, my residence is No. 70 Duke street, Norfolk, Va., and my occupation bank clerk.

38 1. Q. Were you officially connected with the First National Bank of Norfolk; if so, how long, and in what capacity were you connected with it?

A. I was cashier from 1866 up to its suspension in May, 1874.

2. Q. Are you acquainted with the defendant J. C. Johnson?

A. I am.

3. Q. Do you know whether or not he visited Norfolk in the year 1873; if so, please state as nearly as you can the date of visit?

A. He was here in 1873, to the best of my recollection about the 1st of December, or latter part of November; I can't fix the date exactly.

4. Q. During his stay in Norfolk, did he visit the bank, and if so, did he, to your knowledge, have any conversation with the officers of the bank as to the affairs of the bank?

A. I saw Mr. Johnson in the bank, in the president's office, in company with Mr. Cole and the president, but do not recollect of being present at any conversation about the affairs of the bank.

5. Q. During Mr. Johnson's interview with Mr. Cole and the president of the bank, in the latter's office, were any statements or other evidence showing the condition of the bank called for and submitted to them?

A. I cannot say positively that they were. My duties at the bank kept me almost continually at the counter, and I did not take much notice of what was going on in the back office, nor did I go in there frequently unless sent for.

6. Q. How long did the interview between Messrs. Cole, Lamb, and Johnson continue?

A. I think Mr. Cole and Mr. Johnson remained in the city two or three days; they were in the bank several times. I do not recollect the length of their interviews.

7. Q. Please refer to the "transfer book" of the bank, and
39 say when the transfer of the shares of stock at that time standing in the name of Mr. Johnson, was made to the defendant Mrs. B. Valentine.

A. On the 15th day of January, 1874, one hundred and thirty shares was transferred by J. C. Johnson, by William Lamb, attorney, to Mrs. B. Valentine, of Kearney, Hudson County, N. J.

8. Q. Did you, in your capacity as cashier, make up the statements and reports from time to time, showing the condition of the bank?

A. The semi-weekly statements were made up by the general ledger bookkeeper; the statements for the comptroller were made by him also, under my supervision.

9. Q. By whom were the published reports of the condition of the bank made up?

A. They were made up by the bookkeeper on forms sent by the Comptroller of the Currency.

10. Q. Upon what basis were these reports last referred to, made up?

A. They were made up from the statement furnished the Comptroller condensed. They did not show the condition of the "note and bill account," as regards the suspended debt, indebtedness of directors, accommodation paper, &c., but it was all put down as "notes and bills."

11. Q. Was all the paper in the bank, or due to the bank, put down in the published reports as of its face value, or of its estimated value?

A. At its face value.

12. Q. In what manner did the semi-weekly reports, so far as they showed the condition of the bank, differ from the published reports?

A. The semi-weekly reports showed the amount of suspended paper, which the printed reports did not.

Cross-examination by counsel for defendants:

40 1. Q. Was there any difference between the published report of

the condition of the First National Bank of Norfolk, Va., and the reports sent to the Comptroller. I allude to the quarterly reports; if so, state what that difference was?

A. None, except as to the different items being condensed, as I have said before.

2. Q. Were the published reports then of your bank true statements of its actual financial condition?

A. I do not think that a person could tell from the published statements of any bank its exact financial condition, without knowing more about the character of its assets than is so published.

3. Q. Will you examine the paper here produced, purporting to be a report of the condition of the First National Bank of Norfolk, Va., at the close of business, February 27, 1874, and state whether the same is a correct copy of the said bank report at that date?

A. It seems to be correct, but I cannot swear that it is a correct copy, unless I could compare it with the original or a printed copy.

(The defendants' counsel here files the paper which the witness has just examined, and the same is marked Exhibit B, with this deposition. A printed copy of the report of the same date will also be filed.)

4. Q. When was the bank's report of its condition, immediately preceding the report just filed, made and published?

A. My recollection is that it was the last of year 1873.

5. Q. When was the report just prior to that one made and published?

A. To the best of my recollection about three months previous.

6. Q. What do these several published reports show to the public as to the business of the bank; was it improving or not?

41 A. They show that the deposits of the bank were gradually reducing and its business falling off.

7. Q. Have you any of these reports? If so, produce them.

A. I have none of them.

8. Q. Do you know, of your own knowledge, whether any of these reports, whether quarterly or semi-weekly, were exhibited to Mr. Johnson at the time of his visit to Norfolk, alluded to in your examination-in-chief?

A. I cannot say that they were; I do not recollect its being done.

9. Q. Where these quarterly reports above.

42 2. Q. At the time referred to was or was not the First National Bank able to pay its liabilities?

A. I considered at the time that it was—I mean its indebtedness, not its stockholders.

3. Q. What indebtedness at that time do you refer to?

A. Amount due depositors.

4. Q. Did the bank at that time have on hand sufficient available assets to pay its then indebtedness?

A. I considered at that time that if we had sufficient time to collect the assets that we had on hand that we could eventually pay the depositors.

5. Q. Could the bank at that time, without indulgence, have paid its creditors?

A. I am sure not, because there was a great deal of paper held by the bank that I considered would eventually be good, but turned out afterwards to be bad.

6. Q. Was the opinion which you expressed in your answer to the 2nd question founded upon the supposition that the paper in the bank was good?

A. Enough of it to pay its liabilities, as I thought.

7. Q. In the light of subsequent developments as to the value of that paper, do you think that the First National Bank, in November and December, 1873, was solvent or insolvent?

A. It turned out to be insolvent.

8. Q. At the time referred to were you acquainted with the persons liable to the bank on paper in the bank, and did you know the value of that paper?

A. I was acquainted with most of them, but find out I did not know its value.

9. Q. Please look at the paper filed with your cross-examination, and marked B, and say what amount, if any, of the item "Loans and discounts, $176,464.78," was worthless.

A. I cannot state the amount, as I am not informed of how much was subsequently collected. I think about seventy thousand turned out to be bad—I mean seventy thousand dollars. It is pretty difficult to answer the question correctly.

43 10. Q. Please look at the item in the said paper under the head of resources (due from State banks and bankers), eight thousand six hundred sixty-eight dollars and eighty-six cents ($8,868.86), and say how much of that item represented bad debts and how much good.

Witness having taken the said paper, compared it with the printed copy of the said bank's report as published in the Norfolk Landmark, a newspaper published in the city of Norfolk, in the issue of said paper bearing date Thursday morning, March 26th, 1874, the said newspaper having been first produced and exhibited to the commissioner taking these depositions, found the said copy of the written paper to be true and correct in every particular.

(The defendant, J. C. Johnson, by his counsel, objects to this question, as also to the question 9th and the answer thereto, on the ground that the said question 9 and the answer thereto is not the best evidence of the facts sought to be addressed, and that this question will not elicit the best evidence on this point.)

A. I think nearly all of it turned out to be bad.

11. Q. Can you state more accurate how much of it turned out to be bad?

(The defendant J. C. Johnson objects to this question and to all questions touching the ultimate failure of the bank as entirely irrelevant and impertinent to the issue joined in this suit.)

A. Over eight thousand dollars of it.

12. Q. Do you know whether or not the banking-house referred to in said paper has since been sold? If so, please state when it was sold, and, if you know, the amount for which it was sold.

44 (Objected to, on the ground that this is not the best evidence of the fact inquired into.)

A. I understand that it has been sold. I don't know what it sold for.

13. Q. Please state when the last dividend was declared on the capital stock of the 1st National Bank of Norfolk, and the amount of such dividend, if any.

A. The last dividend was declared in February, 1873; it was three per cent. on the capital stock February 3d, 1873.

14. Q. When was the last preceding dividend declared?

A. July 9th, 1870; it was four per cent.

Cross-examination resumed:

1. Q. Please examine the paper now shown you, and examine also a bound copy of the Norfolk Landmark, volume 1, from October 2nd, 1873, to March 31*th*, 1874, and compare the said paper with the published report of the condition of the First National Bank of Norfolk as contained in the issue of the Norfolk Landmark, bearing date Friday morning, October 17th, 1873, and state after such comparison whether the said paper is a true and correct copy of the said bank's said report.

(Paper marked Exhibit C filed, C: T. B.)

A. It is.

2. Q. How does this report compare with any previous report of the said bank's condition?

A. My recollection is that this report is about the largest, or will aggregate as much as any made for several years.

3. Q. Referring to question 5 in your redirect examination, to wit, Could the bank at that time without indulgence have paid its creditors? Will you please state whether there was at that time, or is now, any bank in this country, or in any other within your knowledge, which if called upon in the manner indicated in the said question 5th, could have paid its creditors?

45

(Objected to by counsel for plaintiff as illegal, on the ground that it calls for an expression of opinion by the witness.

To which counsel for defendant replies that the witness has testified to such facts as warrant him in the expression of an opinion as a bank expert, and as such the question is propounded to him.

To which counsel for plaintiff rejoins that the testimony does not show that the witness has ever been connected with or is familiar with any other bank or banks, in this or any other country, except the 1st National Bank of Norfolk.)

A. My opinion is that there are few banks in this or any other country that could pay their whole liabilities without some indulgence.

4. Q. At the time of Mr. Johnson's visit to Norfolk, in November or December, 1873, to which you have referred, was not the report of the condition of the bank, as shown by Exhibit C, filed with your deposition, the only report next preceding his visits that could have been exhibited to him, if any such report were so exhibited?

A. No; other printed reports could have been shown him.

Redirect examination resumed by plaintiff's counsel:

1. Q. Please look at paper marked Exhibit C, and say whether or not your answers to questions Nos. 9, 10, 11, and 12, in your first redirect examination with respect to paper marked Exhibit B, applied to the corresponding items in Exhibit C.

46

(Counsel for defendant J. C. Johnson repeats his objection to said questions 9, 10, 11, and 12, and objects to this question on the ground that the evidence it seeks to elicit is not the best evidence of the facts inquired into.)

A. They do.

And further this deponent saith not.

GEO. CHAMBERLAIN.

Subscribed and sworn to before me this 19th day of April, 1877.

CHAS. T. BARRY,
U. S. Commissioner.

Witness George E. Bowden here recalled, and produces the following papers, namely: Copy organization certificate of the First National Bank of Norfolk, certified under the hand and seal of office of John Jay Knox, Comptroller of the Currency; said paper herewith filed, marked Bowden, No. 1. Also, copy of a copy of the authority to commence business from the Comptroller of the Currency to the First National Bank of Norfolk, certified under the hand and seal of office of John Jay Knox, Comptroller of the Currency; said paper is herewith filed, marked Bowden, No. 2. Also, copy under hand and notarial seal of W. H. Hunter, notary public, of protest of a ten dollar circulating note of the 1st National Bank of Norfolk, Virginia, dated May 28th, 1874; said paper is herewith filed, marked Bowden, No. 3. Also, appointment of the said Bowden as receiver of the said bank, under the hand and official seal of John Jay Knox, Comptroller of the Currency, dated June 3rd,
47 1874; said paper is herewith filed, marked Bowden, No. 4. Also, letter addressed to the said Bowden, as receiver, and signed John Jay Knox, Comptroller of the Currency, directing the said Bowden to enforce the whole amount of the liability of the stockholders of the said bank; said letter is herewith filed, marked Bowden, No. 5.

And further this deponent saith not.

G. E. BOWDEN.

Subscribed and sworn to before me this 19th day of April, A. D. 1877.

CHAS. T. BARRY,
U. S. Commissioner.

The following deposition is taken by consent of parties' attornies:

W. H. HUNTER, a witness for the complainant, being called and duly sworn, deposed as follows:

My name is William H. Hunter; my age is 62 years; my residence is 293 Main street, Norfolk, Va.; and my occupation is clerk of the corporation court for the city of Norfolk, Va.

1. Q. Please state whether or not you were officially connected with the First National Bank of Norfolk; and, if so, for how long a time, and in what capacity.

A. I was; nine years or over; book-keeper, from December, 1864, to its close, which, I believe, was in May, 1874.

2. Q. Are you acquainted with the defendant, Mr. J. C. Johnson?

A. I am; I was introduced to him this evening.

3. Q. Do you or not know of Mr. Johnson visiting Norfolk in November or December, 1873?

A. I don't remember the year, but I remember that he was here prior to the closing of the bank.

48 4. Q. State, if you can, how long it was before the suspension of the bank.

A. I cannot say.

5. Q. At what season of the year was it?

A. I cannot say; I can say it was within twelve months before the closing of the bank.

6. Q. During Mr. Johnson's stay in Norfolk did he visit the bank?

A. He did.

7. Q. During his stay at the bank, please state whether or not he held any consultation or had an interview with any of the officers of the bank.

A. Not with me; I don't know that he had with the others.

8. Q. Was he with the president of the bank?

A. I presume so, as he was in the president's office.

9. Q. Do you know whether or not during Mr. Johnson's stay in the president's room any conversation took place between him and others touching the financial status of the bank?

A. I do not.

10. Q. Was it part of your duty as book-keeper to make up the reports and statements showing the condition of the bank?

A. It was.

11. Q. During Mr. Johnson's visit to the bank were any of the reports or statements above referred to called for for use in the president's room?

A. I believe they were.

12. Q. Were they taken into the president's room while Mr. Johnson was there?

A. I believe they were.

13. Q. Please state upon what basis you made up the different reports and statements referred to by you in your preceding answer?

A. Actual balances of the general ledger.

14. Q. Please state how the statements called the published statements differed from the semi or tri weekly reports or statements.

49 A. They were more condensed in their form.

15. Q. Please state from which of these reports information could be most readily and satisfactorily obtained as to the condition of the bank.

A. From the tri-weekly statements.

16. Q. Please state what, in your judgment, was the financial condition of the 1st National Bank in November and December, 1873; was it solvent or insolvent?

A. I think it was insolvent.

17. Q. Please state whether or not it was your custom in making up the published statements to include among the assets of the bank all the papers in and due to the bank, without reference to its real value.

A. Yes, sir; I did. I mean all paper belonging to the bank.

18. Q. During the months of November and December, 1873, please state how much paper was in the First National Bank of Norfolk which in your judgment was worthless, if any such there was.

A. I cannot say as to the amount, but there was a large amount over; I should say fifty thousand dollars.

19. Q. Was that paper included in your statements made up at that time as showing the resources of the bank at its face value, or was its estimated value only given?

A. Its face value.

20. Q. As early as November or December, 1873, was the condition of the affairs of the bank a subject of remark by you to the officers or employees of the bank?

A. I had made the remark in the bank as to it' solvency.

21. Q. Please state as nearly as you can when you made these remarks, and what was the opinion you entertained and expressed at the time.

A. As to when I made these remarks, I can't remember the exact date, but I expressed the opinion that the bank was insolvent. I did this to the officers of the bank.

50 22. Q. As well as you can now remmember, did you entertain the opinion that the bank was insolvent as early as November, 1873?

A. I think I did.

23. Q. At that time, at what value did you include in your statements or reports, showing the resources of the bank, the building in which the bank did business?

A. I think thirty thousand dollars.

24. Q. What at that time, in your judgment, was the fair value *at* said building?

A. I had expressed my opinion as to its value at seventeen thousand dollars.

25. Q. Do you know whether or not since the suspension of the bank, the said building has been sold by the receiver of the said bank, and if so, at what time, and for what price was it sold?

(Objected to by defendants' counsel on the ground that the evidence sought to be elicited by this question, is not the best evidence to prove the time of sale nor the price bid thereat.)

A. It has been sold, the time I do not now recollect, and I have been told for eighteen thousand dollars.

Cross-examination:

1. Q. You do not remember the time or times, if more than one, of Mr. Johnson's visit or visits to Norfolk, do you?

A. I do not.

2. Q. At the time of any visit of Mr. Johnson to Norfolk had you any personal acquaintance with him?

A. I had not.

3. Q. Is not your knowledge as to any such visit derived from hearsay?

A. I think not.

4. Q. How did you know it then?

51 A. He was in company with Mr. Cole, and I was told it was Mr. Johnson.

5. Q. Can you state positively whether any of the reports or statements referred to by you in your direct-examination were exhibited to this defendant, J. C. Johnson, in your bank at any time or times?

A. I cannot.

6. Q. Did not the tri-weekly reports of your bank show the same total aggregate as the published statement or report of condition, when made on the same dates?

A. They did.

7. Q. From what you have said in regard to the manner of making up

these published statements, as well as the tri-weekly reports, were they not calculated to mislead any one who did not possess a very intimate acquaintance with the affairs of the First National Bank?

A. Yes; I think they were.

8. Q. Was your remark, as to the insolvency of the bank, made more than once to the officers of the bank, at the time you refer to, and was such an expression of opinion made to any person other than the officers of the said bank?

A. I think I made the remark more than once, but not to any one outside of the bank.

9. Q. Will you examine the paper marked Exhibit C, filed with the deposition of George Chamberlain, and say whether or not its report of the bank's business does not compare favorably with any previous reports of the condition of the said bank?

A. No, sir; it does not. During the war the business of the bank was much larger, consequently the footings were larger.

10. Q. At the time of this report, Exhibit C, made September 12th, 1873, was there any indication to the public of the insolvency of the bank?

A. None that I knew.

11. Q. Were not these reports sworn to by an officer of the bank?

52 A. They were, by the cashier.

12. Q. Is the said Exhibit C a true and correct copy of the said bank's report of that date?

(Witness here compares it with the published report and makes answer.)

A. I believe it is.

Redirect:

1. Q. Please say whether Mr. Cole, who you say accompanied Mr. Johnson to the bank, is now living or dead?

A. I believe dead.

2. Q. Were the forms in which you made up the reports and statements of the bank prescribed by the Comptroller of the Currency?

A. They were sent us from his office.

3. Q. Were you a notary public on the 28th day of May, 1874?

A. I was.

4. Q. Please look at the paper here handed you marked "Exhibit Bowen No. 3," and say whether or not it is a true copy, under your hand and notarial seal, of the protest made by you of a ten dollar circulating note of the First National Bank of Norfolk, on the 28th day of May, 1874?

A. It is.

5. Q. Did you make said copy and attach your notarial seal thereto?

A. I did.

And further this deponent saith not.

W. H. HUNTER.

Subscribed and sworn to before me this 19th day of April, A. D. 1877.

CHAS. T. BARRY, [L. S.]
U. S. Commissioner.

53 I do hereby certify that the foregoing depositions of George E. Bowden, George Chamberlain, William Lamb, and William H. Hunter, were, when taken, then and there reduced to writing by me in

the presence of the said deponents, and by them respectively subscribed in my presence, after having been so reduced to writing.

I further certify that I was attended by L. L. Lewis, esq., as counsel for the complainant, and by I. S. Garnett, jr., counsel for defendant, Jacob C. Johnson.

I further certify that the reason for taking said depositions was and is, and the fact was and is, that the deponents live in the city of Norfolk, Virginia, more than one hundred miles from Trenton, in the district of New Jersey, where the said civil cause is appointed by law to be tried.

I further certify that I am not of counsel, nor attorney to either of the parties in this suit, nor interested in the event of this cause.

I further certify that it being impracticable for me to deliver said depositions with my own hand to the court for which they were taken, I have retained the same for the purpose of being sealed up by me, and speedily and safely transmitted by the United States mail to the said court for which they were taken, and to remain under my seal until they are opened.

I further certify that the fee for taking said depositions, amounting to $25.00, has been paid to me by the plaintiff, and the same is just and reasonable for the services performed.

Given under my hand and seal of office, at Norfolk, in the eastern district of Virginia, this 20th day of April, A. D. 1877.

[L. S.] CHAS. T. BARRY,
U. S. Commissioner.

54 In the circuit court of the United States for the district of New Jersey.

BETWEEN GEORGE E. BOWDEN, RECEIVER, &c., complainant,
and
JACOB C. JOHNSON AND MRS. B. VALENTINE, defendants.
} On bill, &c.

Please take notice that George E. Bowden, William Lamb, George Chamberlain and others, necessary witnesses on the part of the complainant in the above cause, living in Norfolk, in the State of Virginia, a greater distance than one hundred miles from Trenton, in the State of New Jersey, the place of trial of said cause, will be examined and their depositions taken de bene esse, on the part of said complainant, before Charles T. Barry, esq., a commissioner duly *duly* appointed by the circuit court of the United States, for the eastern district of Virginia, by virtue of an act entitled "An act for the more convenient taking of affidavits and bail in civil causes," at his office, in the city of Norfolk, in the State of Virginia, at twelve o'clock, m., of the 19th day of April, A. D. 1877, or before some other officer authorized to take such depositions de bene esse, at which time and place you are hereby notified to be present.

THOS. D. HOXSEY,
Solicitor and of Counsel with Complainant.

To THOS. W. MCCARTER,
Solicitor of Defendants.

55 Due and legal service of the above notice is this day acknowledged. Dated April 5th, A. D. 1877.

THOMAS W. McCARTER,
Solicitor of Defendants.

(Endorsed:) In the district court of the United States for the district of New Jersey. Between George E. Bowden, receiver, complainant, and Jacob C. Johnson and Betsey Valtine, defendants. Notice of taking deposition de bene esse. Thos. D. Hoxsey, solicitor.

56 [SEAL OF COMMISSIONER.] The President of the United States of America to William Lamb, George Chamberlain, George E. Bowden, greeting:

We command you that, all and singular, business and excuses being laid aside, you and each of you be and appear in your proper persons before Chas. T. Barry, a commissioner appointed by the circuit court of the United States of America for the district of Virginia, at his office in Norfolk, in the said district, on the 19th day of April, 1877, at 11 o'clock in the forenoon of the same day, on the part of the United States, to testify all and singular what you and each of you may know relative to a certain complaint now depending undetermined in the circuit court of the United States for the district of New Jersey, wherein George E. Bowden, receiver, is complainant, against Jacob C. Johnson and Betsey Valentine as defendants.

And this you, or either of you, are not to omit under the penalty upon each and every of you of two hundred and fifty dollars.

Witness Hon. W. R. Waite, Chief Justice of the United States, at the city of Norfolk, Virginia, in said district, the 19th day of April, in the year of our Lord one thousand eight hundred and seventy-seven.

CHAS. T. BARRY,
United States Commissioner for the District of Virginia.

57 (Endorsed:) United States, eastern district of Virginia. George E. Bowden, receiver, et als. 1st National Bank, Norfolk, vs. J. C. Johnson and Betsey Valentine. Subpœna. Chas. T. Barry, U. S. commissioner.

Executed as herein commanded this 19th day of April, A. D. 1877.

C. P. RAMSDELL,
U. S. Marshal,
By L. B. FOULD,
Special Deputy.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Washington, February 23rd, 1864.

Whereas by satisfactory evidence presented to the undersigned, it has been made to appear that the First National Bank of Norfolk, in
58 the city of Norfolk and State of Virginia, has been duly organized under and according to the requirements of the act of Congress, entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25th, 1863, and has complied with all the

provisions of said act required to be complied with before commencing the business of banking:

Now, therefore, I, Hugh McCulloch, Comptroller of the Currency, do hereby certify that the First National Bank of Norfolk, city of Norfolk, and State of Virginia, is authorized to commence the business of banking under the act aforesaid.

In testimony whereof witness my hand and seal of office, this twenty-third day of February, 1864.

(Signed) HUGH McCOLLOCH,
Comptroller of the Currency.

No. 271.

TREASURY DEPARTMENT,
Office Comptroller of the Currency, ss:

I certify the foregoing to be a true and complete copy of a copy of the certificate of authority of the First National Bank of Norfolk, Va., issued from this office on the 23rd day of February, 1864, the original of which was forwarded to the bank on the last named date.

{CURRENCY BUREAU. SEAL OF THE COMPTROLLER OF THE CURRENCY.} In testimony whereof I have hereto subscribed my name, and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, the fourth day of May, A. D. 1876.

JOHN JAY KNOX,
Comptroller of the Currency.

59 EXHIBIT BOWDEN NO. 2.—C. T. BARRY, *U. S. Commissioner.*

No. 271.

1ST NATIONAL BANK NORFOLK, VIRGINIA,
Norfolk, Va., February 1st, 1864.

[C. L. Cole, Feb'y 1st, 1864. 5 ct. stamp. Compared. A. P. S. M. C.]

We whose names are specified in article fourth of this certificate, have associated ourselves for the purpose of transacting the business of banking, under the act of Congress entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25th, 1863.

First. The name and title of this association shall be "The First National Bank of Norfolk."

Second. The said association shall be located in the city of Norfolk, county of , and State of Virginia, where its operations of discount and deposit are to be carried on.

Third. The capital stock of said association shall be one hundred thousand dollars ($100,000), and the same shall be divided into one thousand shares of one hundred dollars each.

Fourth. The name and residence of each of the shareholders of this association, with the number of shares held by each, are as follows:

Name.	Residence.	No. of shares.
Wm. H. Turner,	Norfolk	20
Porter Sherman,	"	30
Ryland Cappe,	"	10
R. B. Smith,	"	10
Stephen Winingder,	"	10
Peter H. Whitehurst,	"	20
60 Thos. Winingder,	"	5
Edw. P. Snively,	"	5
Peter Dilworth,	"	10
Daniel Paterson,	"	10
Joseph Williams,	"	5
Soloman Weil,	"	10
Elijah Ullman,	"	10
Thomas Griffin,	"	5
Barnard E. C. Folger,	"	10
Henry Werthemer,	"	20
Charles S. Holt,	"	5
Andrew L. Hill,	"	10
Fr'd'rk Gotsberger,	"	5
Thomas P. Crowell,	"	5
Dewit C. Farrington,	"	10
George W. Cowdry,	"	5
Edward I. Griffith,	"	5
Warren W. Wing,	"	10
Wm. T. Harrison,	"	10
Joseph A. Buck,	"	10
Jas. G. Shaw,	"	10
George W. Singleton,	"	10
Enoch Capps,	"	5
Lewis Sulasbury,	"	5
James C. Jones,	"	10
Lucius H. Chandler,	"	50
Calvin L. Cole,	"	150
John Dood,	"	5
Lyman Reynolds,	"	10
Wm. Lockhart,	"	10
Charles C. Rhodes,	Philadelphia	470

Fifth. Said association shall commence on the fifteenth (15) day of February, 1864.

Sixth. This certificate is made in order that we may avail ourselves of the advantages of the aforesaid act.

61 Witness our hands and seals this first day of February, 1864.

W. H. TURNER.	[L. S.]	D. W. C. FARRINGTON.	[L. S.]
RYLAND CAPPS.	[L. S.]	G. W. COWDRY.	[L. S.]
R. B. SMITH.	[L. S.]	E. J. GRIFFITH.	[L. S.]
STEPHEN WININGDER.	[L. S.]	W. W. WING.	[L. S.]
P. H. WHITEHURST.	[L. S.]	WM. T. HARRISON.	[L. S.]
THOS. WININGDER.	[L. S.]	JOSEPH A. BUCK.	[L. S.]
EDW'D. P. SNIVELL.	[L. S.]	J. G. SHAW.	[L. S.]
P. DILWORTH.	[L. S.]	G. W. SINGLETON.	[L. S.]
D. PATTERSON.	[L. S.]	ENOCH CAPPS.	[L. S.]
JOSEPH MILLWARD.	[L. S.]	L. SULASBURY.	[L. S.]
S. WEIL.	[L. S.]	J. C. JONES,	[L. S.]
E. ULLMAN.	[L. S.]	L. H. CHANDLER.	[L. S.]
THOS. GRIFFIN.	[L. S.]	C. L. COLE.	[L. S.]
BARNARD E. C. FOLGER.	[L. S.]	JOHN DODD.	[L. S.]
H. WERTHEMER.	[L. S.]	L. REYNOLDS.	[L. S.]
CHAS. S. HOLT.	[L. S.]	WM. LOCKHART.	[L. S.]
A. L. HILL.	[L. S.]	PORTER SHERMAN.	[L. S.]
F. GOUSBERGER.	[L. S.]	C. C. RHODES.	[L. S.]
THOS. P. CROWELL.	[L. S.]		

STATE OF VIRGINIA,
City of Norfolk, ss:

On this the third day of February, A. D. 1864, personally came before me William H. Turner, Ryland Capps, Rodney B. Smith, Stephen Winingder, Peter H. Whitehurst, Thomas Winingder, Edward P. Snivelly, Peter Dilworth, Daniel Patterson, Joseph Millward, Solomon Weil, Elijah Ullman, Thomas Griffin, Barnard E. C. Folger, Henry Werthemer, Charles S. Holt, Andrew L. Hill, Frank Gousberger, Thomas P. Crowell, De Witt Clinton Farrington, George W. Couderv, Edward J. Griffith, Warren W. Wing, William T. Harrison, Joseph A. Buck, James G. Shaw, George W. Singleton, Enoch Capps, Lewis Salusbury, James C. Jones, Lucius H. Chandler, Calvin L. Cole, John Dodd, Lyman Reynolds, William Lockhart, and Porter Sherman, to me well known, who severally acknowledged that they executed the foregoing instrument for the purposes therein mentioned.

62 Witness my hand and seal of office the day and year aforesaid.

[SEAL OF *of* NOTARY.] D. C. CROWELL,
Notary Public.

[D. C. C. Feb. 3, 1864. 5c. stamp.]

STATE OF PENNSYLVANIA,
City of Philadelphia, ss:

On this, the sixth day of February, A. D. 1864, personally came before me Chas. C. Rhodes, who acknowledges that he executed the foregoing instrument for the purposes therein mentioned.

Witness my hand and seal of office the day and year aforesaid.

[SEAL OF NOTARY.] EDMUND WILCOX,
Notary Public.

TREASURY DEPARTMENT,
Office of the Comptroller of the Currency, ss:

I certify the foregoing to be a true and complete copy of the original organization certificate of "The First National Bank of Norfolk," with the acknowledgments thereof, now on file and of record in this office, and of the whole of such originals, and that such originals were so filed and recorded on the 18th day of February, A. D. 1864.

63 In testimony whereof I have hereunto subscribed my name, and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this 4th day of May, A. D. 1876.

{SEAL OF THE COMPTROLLER OF THE CURRENCY.} JNO. JAY KNOX,
Comptroller of the Currency.

(Endorsed:) 1st National Bank, Norfolk. Exhibit Bowden No. 1. C. T. Barry, U. S. commissioner.

NATIONAL CURRENCY.

TEN. A. Ż 854,333 10.

This note is secured by bonds of the United States, deposited with the U. S. Treasurer at Washington.

L. E. CHITTENDEN, *Register of the Treasury.* F. E. SPINNER, *Treasurer of the U. S.*

NORFOLK, VA., *Mar. 7th*, 1864.

The First National Bank of Norfolk, will pay ten dollars to bearer, on demand.

VIRGINIA.

2,279 GEO. CHAMBERLAIN, *Cashier.* WILLIAM LAMB, *President.*

64 Across the face of the above:
Protested for non-payment, May 28th, 1874.
W. H. HUNTER,
Notary Public.

UNITED STATES OF AMERICA,
State of Virginia, City of Norfolk, ss:

[SEAL OF NOTARY PUBLIC.] Be it known that on this 28th day of May, in the year of our Lord one thousand eight hundred and seventy-four, at the request of Walter S. Johnson, the holder of the original of the above copied national currency note, I, W. H. Hunter, a notary public in and for the city aforesaid, by lawful authority, duly commissioned and sworn, did present the original of the above copied national currency note to Mr. George Chamberlain, cashier of the First National Bank of Norfolk, Va., and demanded payment thereof, whereupon he replied, "I decline to pay it. By order of the directors this bank has suspended until the second day of June," which answer was not satisfactory.

Thereupon I, the said notary, at the request aforesaid, did protest, and by these presents do most publicly and solemnly protest, as well against the First National Bank of Norfolk, Va., as against all others whom it doth and may concern, for all loss, damage, exchange, re-exchange, principal, interest, and costs already incurred or to be hereafter incurred for want of payment of the said original.

In witness whereof I, the said notary, have hereunto set my hand and affixed my notarial seal the day and date first above written.

W. H. HUNTER,
Notary Public.

65 CHARGES.

Protest	1
State tax	1
Revenue stamp	
Notices	
Postage	
	2 00

A true copy, as witness my hand and seal. { SEAL OF NOTARY PUBLIC. }
W. H. HUNTER, *N. P.*

(Endorsed:) 1st National Bank, Norfolk, Va. Exhibit Bowden No. 3.
C. T. Barry, U. S. commissioner.

TREASURY DEPARTMENT,
OFFICE COMPTROLLER OF THE CURRENCY,
Washington, D. C., June 3rd, 1874.

Notice having been received by me that the First National Bank of Norfolk, Va., a national banking association, formed pursuant to the laws of the United States and located in the city of Norfolk, State of Virginia, had failed to redeem its circulating notes when payment thereof was legally demanded at the office of said association, and being satisfied from the protest of one of the circulating notes of said association of the denomination of ten dollars, and from information from Orson Adams, special agent, appointed with the concurrence of the Secretary of the Treasury,
66 that the said association has refused to redeem in lawful money of the United States its circulating notes when payment thereof was legally demanded during the usual hours of business at the office of said association, and is in default:

Now, therefore, I, John Jay Knox, Comptroller of the Currency, in pursuance of the power and authority vested in me by law, do hereby appoint George E. Bowden receiver of the "First National Bank of Norfolk, Va., with all the powers, duties, and responsibilities given to or imposed upon a receiver under the provisions of the act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3rd, 1864.

In witnes' whereof I have hereunto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, the day and year first above written.

{ CURRENCY BUREAU. SEAL OF THE COMPTROLLER OF THE CURRENCY. }

JNO. JAY KNOX,
Comptroller of the Currency.

1st National Bank, Norfolk, Va. Exhibit Bowden No. 4. C. T. B., U. S. commissioner.

67

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
Washington, Aug. 13th, 1873.

SIR: Having determined that in order to discharge the legal debts and liabilities of the "First National Bank of Norfolk," it will be necessary to enforce and collect the whole amount of the personal liability of the individual stockholders owning stock at the date of the suspension of said bank, so far as the same can be done by legal proceedings, you are directed at once to institute such legal proceedings in the proper court as may be necessary to enforce against each and every stockholder of said bank owning stock or any interest therein at the time said bank suspended his or her personal liability as such stockholder under the provisions of section 5151 of the Revised Statutes of the United States, and this order must be held to extend to all cases save those where because of bankruptcy or apparent insolvency such legal proceedings would be of no avail.

Very respectfully,

JNO. JAY KNOX,
Comptroller Curr'y.

GEO. E. BOWDEN, Esq.,
Rec'r First Nat. Bank, Norfolk, Va.

Comptroller to Bowden. Exhibit Bowden No. 5. C. T. B., U. S. commissioner.

68

BELLEVILLE, ESSEX COUNTY, N. J.,
December 5th, 1873.

Col. WM. LAMB, *Norfolk, Va.:*

D'R SIR: I regret to say that I will be unable to comply with your wishes in letting the First National Bank have $25,000. I cannot raise the money. I was depending for the greater part of it on my folks in San Francisco, and they send me word that they cannot let me have the money, as they need all they can lay their hands on to get through the winter. The bulk of my means is in real estate and cannot readily be converted into cash.

I have disposed of my stock in the First National Bank of Norfolk, and enclose certificate of my shares with power of attorney, &c., to transfer.

Please have the stock transferred to Mrs. B. Valentine, and send this certificate to her at Belleville, Essex County, New Jersey.

Yours, &c.,

J. C. JOHNSON.

DEAR MR. COLE: I send you the enclosed to show you, Mr. Johnson. Please let me know who Mrs. B. Valentine is. I shall make an assessment on our stockholders of 50 per cent. If she is not able to pay it I will not transfer the stock.

Please return this letter.

Y'rs truly,

WILLIAM LAMB.

69 Mrs. Valentine is the sister of Johnson, the wife of a poor man that Johnson employs on his farm. I will not transfer the stock, but notify him at once that you have made an assessment of 50 per cent.

Yours, truly,

CH. COLE.

Copy of letter written by Wm. Lamb to J. C. Johnson.

NORFOLK, *February 14th*, 1874.

DEAR SIR: I find the enclosed certificate has not been forwarded to Mrs. Valentine, although issued a month ago; please hand it to her.

I regret not hearing from you in regard to the proposition made by the directors. Something must be done at once. The bank cannot go on as affairs are now, and if I surrender it to a receiver I know our stock will be worthless; the margin is too small. If I could have gotten the refusal of all the stock I might have induced some capitalists to come in, but I am afraid it is too late now. With $4,000 cash I could have infused new life into our stock and built it right up. Please let me hear from you, as I suppose you must feel an interest in Mrs. Valentine's stock.

(Endorsed:) Lamb, Exhibit A 1. Filed with answer to question 18.

Report of the condition of the First National Bank of Norfolk, at Norfolk, in the State of Virginia, at the close of business, February 27th, 1874.

70 RESOURCES.

Loans and discounts	$176,466 78
Overdrafts	1,242 82
U. S. bonds to secure circulation	100,000 00
Other stocks, bonds, and mortgages	15,450 57
Due from redeeming and reserve agents	158 21
Due from national banks	2,467 78
Due from State banks and bankers	8,668 86
Banking house	30,000 00
Current expenses	517 64
Taxes paid	1,615 68
Premiums	10,881 75
Checks and other cash items	636 99
Bills of other national banks	704 00
Fractional currency	122 79
Specie	637 22
Legal-tender notes	25,500 00
Total	$387,168 89

LIABILITIES.

Capital stock paid in	$100,000 00
Surplus fund	3,000 00
Discount	692 13
Exchange	269 69
Profit and loss	119 82
National bank circulation outstanding	93,500 00
Individual deposits	129,695 43
Demand certificates of deposits	24,179 36
Due to national banks	12,547 00
Due to State banks and bankers	19,144 69
Bills payable	4,000 00
Total	$387,168 89

71 STATE OF VIRGINIA,
City and County of Norfolk, ss:

I, George Chamberlain, cashier of the First National Bank of Norfolk, Va., do solemnly swear that the above statement is true, to the best of my knowledge and belief.

GEO. CHAMBERLAIN, *Cashier.*

Subscribed and sworn to before me this 25th day of March, 1874.

W. H. HUNTER,
Notary Public.

Correct. Attest:
WM. LAMB,
W. H. TURNER,
C. H. SAUTOR,
Directors.

(Endorsed:) Exhibit B. Filed with deposition of George Chamberlain.

Report of condition of the First National Bank of Norfolk, at Norfolk, in the State of Virginia, at the close of business September 12th, 1873.

RESOURCES.

Loans and discounts	$268,762 71
Overdrafts	2,922 25
U. S. bonds to secure circulation	100,000 00
U. S. bonds to secure deposits	50,000 00
Other stocks, bonds, and mortgages	14,305 37
72 Due from redeeming and reserve agents	30,306 57
Due from national banks	2,703 36
Due from State banks and bankers	8,670 42
Banking house	30,000 00
Current expenses	1,729 27
Taxes paid	1,182 12
Premiums	15,453 36
Checks and other cash items	1,589 54
Bills of other national banks	561 00

Fractional currency	1,976 23
Specie (coin)	1,229 60
Legal-tender notes	39,500 00
Total	$566,891 82

LIABILITIES.

Capital stock paid in	$100,000 00
Surplus fund	5,500 00
Discount	2,887 26
Exchange	510 51
Interest	432 97
Profit and loss	350 67
National bank circulation outstanding	94,980 00
Individual deposits	250,625 05
Demand certificates of deposits	56,372 01
U. S. deposits	40,642 85
Due to national banks	7,876 91
Due to State banks and bankers	6,713 59
Total	$566,891 82

STATE OF VIRGINIA,
City and County of Norfolk, ss:

I, George Chamberlain, cashier of the First National Bank of
73 Norfolk, Va., do solemnly swear that the above statement is true, to the best of my knowledge and belief.

(Signed) GEO. CHAMBERLAIN, *Cashier.*

Subscribed and sworn to before me this 15th day of October, 1873.

(Signed) W. H. HUNTER,
Notary Public.

Correct. Attest:

(Signed) WM. LAMB,
E. J. GRIFFITH,
C. A. SAUTOR,
Directors.

(Endorsed:) Exhibit C. Filed with George Chamberlain's depositions in answer to question 1, in recross-examination. Chas. T. Barry, U. S. commissioner. April 20th, 1877.

74 In the circuit court of the United States for the district of New Jersey.

IN RE G. E. BOWDEN, RECEIVER, &C.,
vs.
J. C. JOHNSON AND MRS. B. VALENTINE.

Depositions of G. E. Bowden, Wm. Lamb, Geo. Chamberlain, and Wm. H. Hunter.

(Endorsed:) In the circuit court of the United States for the district of New Jersey. In re G. E. Bowden, receiver, &c., vs. J. C. Johnson and Mrs. B. Valentine. Depositions of G. E. Bowden, Wm. Lamb, Geo. Chamberlain, and Wm. H. Hunter.

A true copy.

S. D. OLIPHANT, *Clerk.*

75 United States circuit court in and for the district of New Jersey.

GEORGE E. BOWDEN, RECEIVER, COMPLAINANT,
and
JACOB C. JOHNSON AND MRS. BETSEY VALENTINE, defendants.
} In equity. On bill, &c.

Examination of witnesses and production of exhibits in the above cause had before me, John Whitehead, a United States commissioner in and for the district of New Jersey, at my office in the city of Newark, on Thursday, the second day of August, one thousand eight hundred and seventy-seven, at ten o'clock in the forenoon, on behalf of the complainant above named, upon due notice legal service, which was admitted.

Present, Thomas D. Hoxsey, esq., of counsel with the complainant, and Thomas N. McCarter, esq., of counsel with the defendants.

Mrs. BETSEY VALENTINE, a witness of full age, being duly sworn according to law, produced on the part of the complainant, doth depose and say:

1. Q. You are one of the defendants in this cause, are you not?

A. I am.

2. Q. How old are you, and where were you born, and where do you now reside?

A. I am 53; I was born in Rensselar County, N. Y.; I now reside at Kearney, Hudson County, New Jersey.

76 3. Q. Are you related to or in any way connected with Mr. Johnson, the defendant in this suit?

A. I am his mother-in-law.

4. Q. Is his wife—your daughter—deceased?.

A. She is.

5. Q. Are you in charge of his family?

A. I am.

6. Q. How long have you been so?

A. Six years.

7. Q. You yourself have married; where did you live during your married life?

A. At Wayne County, N. Y., for several years. I was married there. I went to California and lived there thirteen years.

8. Q. Where did your husband die?

A. I am divorced from my husband; he is not dead that I know of.

(Counsel for defendants here interposes an objection to questions 4, 5, 6, 7, 8, and their answers as being matter entirely irrelevant to the issue in the case.)

9. Q. You are the holder of the assignment of the 130 shares of the capital stock of the First National Bank of Norfolk, assigned or transferred

to you by the defendant Jacob C. Johnson on or about January 15, 1874, are you not?

A. I am.

10. Q. Are you at present the holder or owner of the capital stock of any other bank or insurance or railroad company?

(Counsel for defendants objects to question, for question is irrelevant.)

A. I am.

77 11. Q. Then you are not, generally speaking, investing or holding stock or securities in incorporated companies, are you?

(Objected to by counsel of defendants leading and inquiry into the matter, and not relevant to the issue in the case.

Counsel for defendant claims the right to a reasonable extent to treat the witness, being a codefendant, as witness on cross-examination.

Counsel for defendants replies that complainant had an opportunity, by his bill, to address all proper interrogat'ies to their defendant; not having done so, but preferring to call her as a witness, the same rules to examination and cross-examination apply in this case well as in any other, and therefore the complainant has no right to cross-examine his own witness.)

A. I am not.

12. Q. Please state fully how you came to become the possessor, either by gift from Mr. Johnson or by payment to him, of the 130 shares of the capital stock of the First National Bank of Norfolk, Virginia—the stock in question in this suit?

A. Mr. Johnson owed me for services rendered after we came to live where we are. He was to pay me $1,000 a year for my services. He was away a great deal of the time, and I took care of everything while he was gone. He went away two winters to California, and I had the care and responsibility of everything—the entire place—while he was gone.

13. Q. Please state what two winters he was away, if you can recollect.

A. I cannot remember the date well. We have at the place

78 six years. He was away the second winter; then two winters intervened, and he was away another winter.

14. Q. Had Mr. Johnson a family of children?

A. No, sir; he had no children.

15. Q. Please explain why Mr. Johnson should have paid you by the assignment of the Norfolk Bank stock instead of money, if he was indebted to you, and wished to make payment?

A. Because I preferred that. He would have paid money if I had wished it. I thought it would be less trouble for me in that way already invested, and I had to pay no taxes.

16. Q. Did Mr. Johnson's engagement to pay you one thousand per year for services commence at the time you moved to Kearney Township, six years ago, as you have said?

A. It did.

17. Q. Mr. Johnson has not been indebted to you, has he, for any other matter or thing *accept* such service for the last six years?

(Objected to by defendants' counsel as leading.)

A. Since my daughter's death I have had all the charge of Mr. Johnson's clothes, and of his house at San Francisco, and here also. There was no agreement between us for compensation till we came here to Kearney. I always supposed he would compensate for these.

18. Q. Please state in what year your daughter, Mrs. Johnson, died?
A. In 1864.
19. Q. Did you live with your husband up to or about the time you came from California?
A. I did.
20. Q. When did you come from California, and did you go to live at Kearney soon after?
79 A. I think I came from California in 1865 or 1866. I did not go to live at Kearney then, but went there in 1871.
21. Q. Until you went to live at Kearney, where did you reside after you came from California?
A. With my mother at Roundout, N. Y.
22. Q. Where did Mr. Johnson live between the time of your coming from California and his going to live at Kearney?
A. San Francisco, California.
23. Q. What price were you to allow Mr. Johnson in payment for that stock?
A. Fifty cents on the dollar; that was the price Mr. Lamb, the president of the bank, offered for it at the time Mr. Johnson transferred it to me.
24. Q. Did Mr. Johnson represent or inform you that Mr. Lamb, the president of the bank, had offered him fifty cents on the dollar for it?
(Objected to as leading.)
A. I don't think he did at the time.
25. Q. When did he so inform you that Mr. Lamb had so offered him fifty per cent.?
(Question objected to as asserting what is not proven in the case, and as leading.)
A. I can't remember when he so informed me. It was after.
26. Q. You have never seen Mr. Lamb, have you?
A. I have not.
27. Q. Have you ever seen Mr. Cole, who was the president of this bank before Mr. Lamb was president?
A. I have not.
28. Q. Did Mr. Johnson, first before the time he transferred that stock to you go to Norfolk, and if so, did he tell you what he went to Norfolk for?
80 A. He went to Norfolk to see a farm; some land there that he thought of exchanging for this stock.
29. Q. Did he inform you that bank had applied to him for a loan of $25,000?
A. He did not.
30. Q. Did he inform you that during the time he was at Norfolk Mr. Cole, the former president of the bank, had gone to Norfolk with him, for the purpose of ascertaining whether the loan of $25,000 to the bank would be safe, or to that effect?
A. He did not.
31. Q. Did he inform you *it* during his visit to Norfolk he had looked into and examined the financial condition of bank?
A. He did not.
32. Q. Did you suggest to him or he to you the purchase of this stock?
A. I really can't tell; I think I proposed to him to take it instead of money. I am not positive. I think that was the way.

33. Q. Mr. Johnson had then and has now extensive business transactions with San Francisco, has he not?

A. I cannot tell you anything about Mr. Johnson's business. That is something I never inquired into.

34. Q. Mr. Johnson had other bank stock at the time he transferred the stock in question to you, had he not?

A. I don't know that he had; I never heard him speak of any.

35. Q. Please explain, if you can, how you came to the knowledge that he was the owner of the Norfolk bank stock.

A. He told me that he had the stock before he went to Norfolk to see the land that he then thought of exchanging the stock for; I think that was the first I knew of it.

36. Q. And when he came back, or soon after, he proposed to you to take the stock, did he not?

(Objected to as leading.)

81 A. It was a long time after he came back; several months, I think.

37. Q. Are you not mistaken in saying it was several months?

A. It may not have been several months after; it was some time after.

38. Q. Really, Mrs. Valentine, on reflection, was it more than one month?

(Objected to as before.)

A. Perhaps not; I cannot remember.

39. Q. When Mr. Johnson proposed that you should purchase the stock what did he propose? Please give me, as near as you can, the language he used in relation thereto.

(The question is objected to, because it assumes that the witness has said that the proposition came from Mr. Johnson, when, in fact, in answer to question 32, she said that she suggested it.

Counsel of complainant says that, in answer to question 36, the witness says in effect that the proposition came from Mr. Johnson.

Counsel of defendants replies that the form of his objection to that question 36 was that it was framed as to put an answer in the witnesse's mouth to lead her to apparently make a statement in conflict with her former testimony, and thus to entrap his own witness.)

A. I cannot remember the language used.

40. Q. Did not Mr. Johnson tell you before the time that you consented to take the assignment of this stock that Mr. Lamb, the president

82 of bank, had informed him that the capital stock of the bank was seriously impaired?

A. He did not.

41. Q. Did Mr. Johnson tell you that the bank was in good condition, or to that effect, and admit you to purchase as an investment?

A. He did not; I think he told me I could take that or money.

42. Q. He informed you he failed to sell the stock for the land he went to see, did not?

(Objected to by counsel as leading, and counsel for defendants desires to enter upon record his protest against this method of examining the witness.)

A. He said he preferred the stock to the land.

43. Q. Have you now, or had you at the time you took the assignment

of this stock from Mr. Johnson, any money or any property to purchase the stock other than the alleged indebtedness for annual services rendered by you to Mr. Johnson?

(Question objected, because the witness did not testify that she bought the stock with money, and it is therefore immaterial.)

A. I am not dependent entirely; I am not destitute; have enough to keep me from want.

44. Q. Did you give any money or other valuable thing to Mr. Johnson for the transfer of the stock other than his alleged indebtedness to you for service?

A. I told him at the time he might consider all my jewelry his for part compensation.

45. Q. He did not accept of the jewelry, did he?

A. Well, it remained in the house as it always had.

46. Q. Mr. Johnson is a man of good pecuniary means *not* as you understand and are informed, is that not so?

83 (Objected as leading, and calling for leading evidence.)

A. I do not know anything about it; I never inquired, as I said before, and consequently knew nothing about it.

47. Q. Will you please, if you are uninformed as to his affairs, inform us how you came to get knowledge that he owned the Norfolk stock?

A. I have already answered that.

48. Q. Will you answer more fully by stating when Mr. Johnson first informed you that he held this Norfolk bank stock?

A. Just before he went to Norfolk to exchange it.

49. Q. Mr. Johnson has not generally informed you of the business transactions he was engaged in, has he?

A. He has not.

50. Q. Was it before or after he came back from Norfolk that you were informed by Mr. Johnson that he held the stock?

(Objected as having been already twice answered.)

A. I have answered it before; it was just before he went.

51. Q. Was it a mere accidental declaration of Mr. Johnson that he held this stock the first intimation that you had that he was the owner of it.

A. I don't know that accidental is the right word there; we were talking about going there to raise strawberries, the land was planted with strawberries.

52. Q. After you took the transfer of this stock from Mr. Johnson who sent the stock to the bank to have it transferred to you?

A. Mr. Johnson.

53. Q. Were you at the time made aware that the president of the bank declined to transfer it, and wrote Mr. Johnson to that effect?

84 A. I was not.

54. Q. Did not Mr. Johnson inform you that the president had declined to transfer the stock, and that he had written to Mr. Johnson to that effect?

A. He did not.

55. Q. Did not Mr. Johnson inform you that in the same letter to the president of the bank in which he declined the proposition to a loan of $25,000 to the bank, asked of him by the bank, he also enclosed the assignment to you for transfer?

A. I don't think he did; I have no recollection of it.

56. Q. The stock that Mr. Johnson transferred to you was not paid for by either your obligation or promise of payment further than the alleged indebtedness to you, was it?

A. It was not.

57. Q. Did you execute and deliver to Mr. Johnson any receipt or other paper discharging him from obligations to you on account of this transfer of the stock?

A. I did not; because it was not necessary.

58. Q. Did you personally give any attention to the transfer of that stock, or was it entirely done by Mr. Johnson, and then the power of transfer sent to Norfolk, by him?

A. Mr. Johnson sent the stock to Norfolk when the transfer was received to delivered it to me; of course I was aware of the transaction that it was to be transferred to me.

59. Q. Have you ever purchased any other stock, property, matter, or thing of Mr. Johnson other than this stock?

A. No.

60. Q. Have you ever complained to Mr. Johnson of the unfortunate result growing out of the loss of this stock by the failure, within five months after the time of transfer?

A. I have.

85 61. Q. I think you have heretofore testified that at the time the transfer of this stock was made, you had no other stock or bonds, or bank account, or money on deposit, is that so?

(Objected to by defendants' counsel, as the expressing of an opinion on the part of the examining counsel as to testimony given by the witness when no such testimony has been given by her.

Counsel for complainant says the witness is highly intelligent, and if not, can answer for herself.

To which counsel for defendants replies that the witness is a lady unaccustomed to giving evidence, and that it is highly improper to attempt to mislead her by assuming in the question put to her that she has previously testified to a matter on which she has given no evidence.)

A. I don't think there was any bank account nor any money on deposit mentioned; on the other question I don't recollect that there was.

62. Q. Had you at that time any other stock, bonds, bank account, or money in hand, or on deposit in any bank or banks, or in any wise invested for you or for your use?

A. I had no bank account, no stock; I am never without any money to use; I have no bonds.

63. Q. The money that you have were merely pocket funds of small amount, were they not?

(Objected to as leading.)

A. Yes, sir.

86 64. Q. Can you explain why Mr. Johnson should or could have permitted you to invest in this unfortunate stock?

A. I did not consider it unfortunate at the time. The president had just offered fifty cents and thought it worth that at least at the time, and Mr. Johnson also.

65 Q. You understood Mr. Johnson that the president, Mr. Lamb,

had so offered him 50 cents on the dollar, when Mr. Johnson was in Norfolk before the sale of the stock to you; was that not so?

(Question objected, as leading and putting the answer in the witnesse' mouth.)

A. He didn't offer him fifty cents in Norfolk, at least Mr. Johnson did not tell me so; he wrote him a letter before he went to Norfolk offering the fifty cents for the stock; I found that out when Mr. Johnson was negotiating with some parties here in Newark. I simply heard the conversation.

66. Q. Who were then the parties he was negotiating here in Newark?

A. A Mr. Krausss; I don't know really whether it was Mr. Krauss or a Mr. Condit; I couldn't tell who it was. I don't remember; it was some one. I heard the conversation. Perhaps you had better strike out the names. I heard the conversation with Mr. Gutterman, talking about it with him.

Adjourned to two o'clock p. m. After adjournment, parties met as before. Examination-in-chief of Mrs. Valentine was continued by Mr. HOXSEY:

67. Q. What was the date of the letter of Mr. Lamb, president of the bank, offering fifty cents on the dollar for stock, of which you have spoken?

A. I don't know; I don't remember.

68. Q. You have said it was some time before the transfer to you; was it as much as a year, do you think?

87 A. I don't think it was.

69. Q. Was it nine months?

A. Really, I don't know; I can't remember.

70. Q. Was it six months?

A. I don't know any better about that than about the other question. It might have been; I can't tell.

71. Q. Can you not now here remember the names of the persons with whom Mr. Johnson was talking when you obtained knowledge that Mr. Lamb had offered fifty cents for the stock?

A. I cannot.

72. Q. Have you really ever had any other business transactions with Mr. Johnson, than the transfer of this stock?

A. I have answered that question once before, but I have not.

(The counsel of the complaint here asks Mr. McCarter and Mr. Johnson, the defendant, that the letter of Mr. Lamb, proffering fifty cents on the dollar for the stock, may be produced and offered in evidence, and it shall be received without objection on his part.)

73. Q. Have you ever, except in the transaction of the transfer of this stock, had any settlement with Mr. Johnson, on any claim or demand that you may have had against him?

A. I have not.

And being cross-examined by Mr. MCCARTER, counsel of the defendants, the witness says:

1. Q. In what month was the arrangement made between you and Mr. Johnson about the stock?

A. In December, 1873.

88 2. Q. You stated, in reply to the 32nd direct question, that you thought you proposed to Mr. Johnson to take the stock, instead of money. Did you mean to be understood, by any subsequent answer, that the proposition for you to take the stock arose with Mr. Johnson?

(Objected to, as an improper question to the witness, standing as she does in this case as a party.)

A. No.

BETSEY VALENTINE.

Sworn and subscribed before me at Newark, N. J., August 2, 1877.

J. WHITEHEAD,
U. S. Commissioner.

The complainant here announced that his evidence is here closed.

DISTRICT OF NEW JERSEY:

I, John Whitehead, U. S. commissioner in and for the district of New Jersey, do hereby certify that the foregoing testimony was taken before me as such commissioner, at my office in the city of Newark, in said district, in the presence of Thomas D. Hoxsey, esq., of counsel with the complainant, and of Thomas N. McCarter, counsel with the defendants; that the witness, Betsey Valentine, was duly sworn, according to law, upon the Holy Evangelist Almighty God, and that her testimony was taken by me in my own handwriting in the presence of the parties and of the said counsel, and that when so taken down the said witness subscribed her name thereto in my presence. And I do hereby further certify that the said complainant paid me for my fee the sum of eight dollars and sixty-five cents, and the said defendants paid me for my fee the sum of forty cents.

J. WHITEHEAD,
U. S. Commissioner.

AUGUST 2, 1877.

89 (Endorsed:) United States circuit court. George E. Bowden, receiver, &c., vs. Jacob C. Johnson et al. In equity. Examination of Mrs. Betsey Valentine. Thos. N. McCarter, of counsel with defendants; Thos. D. Hoxsey, of counsel with plaintiff.

90 United States circuit court, district of New Jersey.

GEORGE E. BOWDEN, RECEIVER, &c.,
vs.
JACOB C. JOHNSON & BETSY VALENTINE. } On bill, &c.

Opinion of the court by Nixon, district judge.

The bill is filed in this case by George E. Bowden, receiver, to enforce the personal liability of one of the alleged stockholders of an insolvent national bank. It charges that the defendant Johnson, on or about the 10th day of January, 1870, became the purchaser & owner of one hundred and thirty shares of the capital stock of the First National Bank of

Norfolk, Virginia; that the said association, on the 26th day of May, 1874, failed to redeem its circulating notes & was in default generally; that on the third day of June following, the complainant was appointed receiver, by the Comptroller of the Treasury, to take charge of the
91 assets, & wind up & settle its affairs; that some time in the month of January, 1874, the defendant Johnson visited Norfolk, for the purpose of examining into the condition of the affairs of the said association; that becoming satisfied from his inquiries & from the examination made by him, & from other information in relation to said bank that its affairs were in a critical condition & a suspension was inevitable, he returned to New Jersey, & immediately thereafter, to wit, on the 15th day of January, 1874, in order to exonerate himself from liability to the creditors of the said association, by reason of his ownership of one hundred & thirty shares of its capital stock, he transferred or caused to be transferred, in due form on the books of the association, to the other defendant, Betsey Valentine, the said 130 shares owned by him; that said pretended transfer was made without legal consideration, & with a view of releasing the said Johnson from his personal liability as a stockholder, & to one who was well known to the said Johnson to be utterly insolvent.

92 The prayer is that the transfer may be set aside as fraudulent & void; and that the defendant Johnson may be decreed to pay the par value of the said one hundred & thirty shares of stock, in accordance with the assessment ordered by the Comptroller.

The defendants have put in a joint & several answer, in which they deny all the material allegations of the bill, and claim that the transfer was made by the said Johnson to the said Valentine, who was his mother-in-law, in good faith & for a valuable consideration, without knowledge of the failing condition of the said association.

Does the evidence in the case overcome the force of the defendant's denial in the answer?

The old rule in equity that where a material fact was directly put in issue by the answer, the evidence of two witnesses was required as the foundation of a decree, has been modified in the modern practice.
93 But a single witness is still insufficient. He must be corroborated either by additional testimony or by circumstances, before a decree can be entered for the complainant. 1 Green. Ev., § 260; Cooth vs. Jackson, 6 Ves., 40; Heffner vs. Miller, 2 Mun., 43; Smith vs. Brush, 1 John. Ch., 460; Clark vs. Van Reinsdyk, 9 Cranch, 160; 2 Sto. Eq., § 1528; Brown vs. Bulkley, 1 McCart., 294.

Upon what evidence does the complainant rely to overcome the answer? It must be borne in mind that the bill charges fraud. The burden of proof rests upon the complainant, & the fraud being disavowed by the answer the complainant must maintain his suit by his own strength. The late Mr. Justice Story, in considering a very similar case (Phettiplace vs. Sayles, 4 Mason, 319), says: "It is necessary to consider whether the circumstances relied on, as presumptive of fraud, are of such a nature as ought to outweigh the positive denials of the answer. It is not sufficient for the plaintiff to show circumstances of suspicion or doubt or
94 even of inflamed suspicion or doubt. He must go further & establish beyond a reasonable doubt that the weight of evidence & circumstances are so decisively in his favor as to destroy the ordinary credit of the answer."

The evidence relied upon to prove the fact that a fraudulent transfer of the stock was made by Johnson to his codefendant, Valentine, to escape an impending personal liability as stockholder, is the testimony of Lamb, late president of the insolvent corporation, of Chamberlain, the cashier, & of Hunter, the bookkeeper.

Mr. Lamb states that in the latter part of 1873, owing to the straitened condition of the bank, he was anxious to effect a loan on its real estate, & wrote to a Mr. Cole, a former president, then living in New York, to assist him in doing so. Mr. Cole replied that he had a friend (the defendant Johnson) who was able to make the loan, and who, he thought, would do so if proper representations could be made to him, and
95 that he would bring him to Norfolk, where the witness could talk to him on the subject. He did bring him some time in the month of November of that year, & the witness endeavored to borrow for the bank $25,000, to be secured by mortgage on the banking house. He represented to him that the need was urgent, that he thought the security was good, and appealed to him as a stockholder to make the loan. Johnson promised to look into his affairs when he returned home, & if he could conveniently do so, to comply with his request. Shortly after his return the witness received a letter from him dated December 5, 1873, in which he says: "I regret to say that I will be unable to comply with your wishes in letting the First National Bank have $25,000. I cannot raise the money. I was depending for the greater part of it on my folks in San Francisco, & they send me word that they cannot let me have the money, as they need all they can lay their hands on to get through the winter. The bulk of my means is in real estate & cannot readily
96 be converted into cash." He then adds: "I have disposed of my stock in the First National Bank of Norfolk, & enclose certificate of my shares, with power of attorney, &c., to transfer. Please have the stock transferred to Mrs. B. Valentine, & send this certificate to her at Belleville, Essex County, New Jersey."

He did not comply with the request at once. He hesitated about it, as the loan having failed, he was contemplating an assessment of 50 per cent. on the stockholders to help the bank thro' its difficulties, & he wanted to be advised of the solvency of the party to whom the transfer was to be made; but after obtaining legal advice to the effect that he had no right as president to refuse, he did transfer it on the 15th of January, 1874, & on the 14th of February following sent the same to Johnson for Mrs. Valentine.

And being asked whether any conversation took place between himself & Johnson during the stay of the latter in Norfolk as to the general affairs and condition of the bank, he replied that he could not re-
97 member the details of any conversation; but had the impression that he called attention to the fact that the capital had been seriously impaired by the Elkton suit & other litigation, & that the panic had caused them to lose business & to be hard up, & to the necessity of having ready money to retain their business, & to recover their position. He had no recollection that any of the books & papers of the bank were shown to him; but it was customary for a semi-weekly statement of the condition of the bank to be made up by the general ledger book-keeper, which gave a very good idea of the condition of affairs, & he supposed that

these statements must have been shown, altho' he does not clearly remember the fact.

The bank suspended payment and business on the 26th of May, 1874, & he states on cross-examination that he hoped, up to the day before closing, that the business would be resuscitated, & the solvency of bank secured; that after the panic of 1873, the solvency of the bank de-
98 pended mainly on the prosecution of his individual credit, unless other assistance could be had; but that fact was only known to himself.

Mr. Chamberlain, the cashier, recollects that the defendant Johnson was in Norfolk the last of November, or about the first of December, 1873; that he was in the president's room at the bank several times during his stay; but he has no recollection of being present at any conversation about the affairs of the association, or that any statements, or other evidence showing its condition was called for or submitted to them. He says that the last quarterly report of the business of the banks, previous to the visit of Johnson, was Exhibit C, which was sworn to by him on the 13th of the preceding month (October), & that no person could tell from these statements and reports the exact condition of the bank, unless he knew more about the real character of the assets than is so published.

99 We find nothing in the testimony of Mr. Hunter, the bookkeeper, which would seem to affect the defendants. He states it as his judgment that the association was insolvent in the fall of 1873; but he avers that he did not communicate his opinion to any one outside of the bank. It is not apparent how such secret knowledge, if true, is of any practical importance in the case, unless traced home to Mr. Johnson.

He recollects, indeed, that Johnson was at the bank with the president about the close of the year 1873, & he believes that the semi-weekly & quarterly statements prepared by him & left under his control, were taken to the president's room at the time of his visit. He knows nothing more. The inference to be drawn is, that the statements were shown to Mr. Johnson. But what then? These statements & reports, upon their face reveal assets largely in excess of the amounts due to the general creditors. Leaving the stockholders out of the account, & the only impression that they would legitimately produce on his mind, would be that the par
100 value of his stock had been impaired either by misfortune or mismanagement. His subsequent sale of the stock to Mrs. Valentine, at the rate of 50 cents on the dollar is sufficient proof that some such impression was made upon him.

But whatever difference of opinion may arise as to the fair import of the testimony of the officers of the bank, there is not much room for doubt, in regard to that of Mrs. Valentine, one of the defendants.

She was placed on the stand by the complainant. He was not compelled to make her his witness, but having voluntarily done so, he must accept her evidence as true, unless she has been contradicted by others. The law does not permit litigants to experiment with interested parties; allowing them to call their adversaries to testify & then to take such portions of their testimony as happens to be in their favor, and to reject such as seems to bear against them.

101 Her statement in regard to the transaction is this: She was the mother-in-law of the defendant Johnson, & had had charge of his

house & family since the death of her daughter in 1864, & for upwards of six years at the fixed compensation of one thousand dollars per year. Understanding from Mr. Johnson that he owned this stock in the First National Bank of Norfolk, & that the president of the association had offered to him fifty cents on the dollar for the same, she proposed to take it at that price in payment for her services. He agreed to the proposal in December, 1873, altho' some delay occurred in having the transfer made & she did not receive the certificate for some time afterwards.

This is the complainant's testimony, and it stands uncontradicted, except by inferences to be drawn from suspicious conduct & acts on the part of the defendants.

There are, doubtless, circumstances in the case which cast over it a cloud of suspicion & doubt. But they are not sufficient to establish bad faith or fraud in the transfer, or to negative the positive denials of the answer.

102 Gould vs. Gould, 3 Sto., 540.

We are quite clear that upon the merits of the case, as exhibited in the pleadings & the proofs, the complainant's bill should be dismissed, and it is ordered accordingly.

103 *Final decree.—Filed January* 16, 1879.

United States circuit court, district of New Jersey.

BETWEEN GEORGE C. BOWDEN, RECEIVER, complainant,
and
JACOB C. JOHNSON AND BETSEY VALENTINE, defendants.
} In equity. On bill, &c.

This cause coming on to be heard before the honorable William McKennan and the honorable John T. Nixon, at the term of March last of said court, in the presence of L. L. Lewis, esq., and Thomas D. Hoxsey, of counsel for the complainant, and of Thomas N. McCarter, of counsel for defendants, on the pleadings and proofs in said cause, and the same having been argued by the respective counsel, and the court having taken time to consider the same, and being of opinion that the complainant is not entitled to the relief prayed for in his said bill:

It is thereupon, on the sixteenth day of January, A. D. 1879, ordered that the said complainant's bill be, and the same is hereby, dismissed with costs, on motion of McCarter and Keen, solicitors of the defendants.

JNO. T. NIXON, *J.*

Filed January 16, 1879.

104 United States circuit court, district of New Jersey, third circuit.

I, S. D. Oliphant, clerk of the said court, do hereby certify the foregoing written and printed pages to be a true transcript of the record and proceedings in case of George E. Bowden, receiver of the First National Bank of Norfolk, Virginia, against Jacob C. Johnson and Betsey Valentine, as fully as the same remain on file and of record in said case in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at office, in the city of Trenton, in said district, this eleventh day of October, in the year of our Lord, eighteen hundred and seventy-nine.

[SEAL.] S. D. OLIPHANT, *Clerk.*

(Indorsement on cover:) No. 166. George E. Bowden, receiver of the First National Bank of Norfolk, Va., appellant, vs. Jacob C. Johnson and Betsey Valentine. New Jersey C. C. U. S. Filed 5th January, 1880.

17-251

OFFICE SUPREME COURT U.S.
FILED
DEC 15 1882
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

GEORGE E. BOWDEN, RECEIVER OF THE FIRST NATIONAL BANK OF NORFOLK, VA.,

vs.

JACOB C. JOHNSON AND BETSEY VALENTINE.

No. 166.

Appeal from a decree in Equity rendered by the Circuit Court of the United States for the District of New Jersey.

BRIEF FOR THE APPELLANT,

BY JOHN A. J. CRESWELL,

Of Counsel for Appellant.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1882.

In the Supreme Court of the United States,

October Term, 1882.

GEORGE E. BOWDEN, Receiver of the First National Bank of Norfolk, Va.,

vs.

JACOB C. JOHNSON and BETSEY VALENTINE.

No. 266.

Appeal from a decree in Equity rendered by the Circuit Court of the United States for the District of New Jersey.

Brief for the Appellant.

NATURE OF THE CASE.

The bill was filed December 13, 1876, under section 5151 of the Revised Statutes, to enforce the individual liability of Johnson as the holder of 130 shares of the stock of the First National Bank of Norfolk, Va., an insolvent corporation; and this appeal is from the final decree of Nixon, judge, dismissing the bill.

ASSIGNMENT OF ERROR.

The court erred in dismissing the bill upon the facts stated and proved, and in not passing a decree requiring the defendants to pay the par value of 130 shares of the stock of the bank, with interest and costs.

STATEMENT.

The bill charges that on the 31st December, 1864, the First National Bank of Norfolk, Virginia, was an association duly organized and authorized to commence business under the national bank act, and that defendant Johnson, on January 10, 1870, became the owner of 130 shares of the capital stock of said association of the value of one hundred dollars each; that on the 26th May, 1874, the bank failed to redeem its circulating notes, and in consequence of such failure the complainant was duly appointed receiver on the 3d of June then next; that some time in January, 1874, the defendant Johnson visited Norfolk for the purpose of inquiring and examining into the condition of said bank; that the said Johnson, becoming satisfied from the inquiries and examinations made by him, and from other information, that the affairs of the bank were in a critical condition, (as in fact they were,) and that a suspension of the bank was inevitable, he, the said Johnson, returned to New Jersey, where he resided, and immediately thereafter, to wit, on the 15th of January, 1874, in order to exonerate himself from liability to the creditors of said bank by reason of his ownership of said stock, transferred or caused to be transferred to Mrs. Valentine, the other defendant, the said 130 shares owned by him as aforesaid. The bill further charges that said pretended transfer was made without legal consideration, and that the deponent, Mrs. Valentine, is and was well known by the said Johnson at the time of said pretended transfer to be utterly insolvent, and that said pretended transfer was made with a view of defrauding the creditors of said bank, and was and is therefore utterly null and void. It was further charged that the assets of said bank would fall far short of paying off and discharging the debts of the said bank, and that therefore the Comptroller of the Currency, in order to provide for the payment of said debts, on the 13th of August, 1875, directed the complainant, as receiver, to proceed to enforce the whole

of the personal liability of all persons owning the capital stock of said bank on the said 26th of May, 1874.

The complainant thereupon invoked the aid of a court of equity to set aside the said pretended transfer and to enforce the personal liability of said Johnson, as the owner of the said 130 shares of stock, and prayed that the said Johnson and Mrs. Valentine might be made defendants to the bill and be required to answer its allegations on oath, that the said pretended transfer of the said stock from said Johnson to said Valentine might be set aside, and that said Johnson might be decreed to pay the complainant the par value of 130 shares of the capital stock of the said association, and for such other and further relief, general and special, as the nature of the case demands, and may be agreeable to equity and good conscience. The bill was properly sworn to by the complainant.

The defendants, in their joint and several answer, admit the organization of the bank, and the purchase of 130 shares of stock by Johnson some time in the year 1869. They also admit that the defendant, Johnson, did visit Norfolk in November, 1873, but deny that he did so for the purpose of inquiring and examining into the affairs of the bank. They also deny that said Johnson on said visit became satisfied from the inquiries and examinations alleged to have been made by him, or from any other information in relation to said bank, that its affairs were in a critical condition, and that a suspension of the bank was inevitable, but allege that said Johnson went to Norfolk in November, 1873, for the purpose of inspecting a farm which it was purposed to exchange with said Johnson for his stock. They also deny that said Johnson during that visit, or at any other time, saw anything in the condition of said bank, except that William Lamb, then president of the bank, and who went with said Johnson to inspect the farm aforesaid, at the same time proposed that said Johnson should loan the bank $25,000, to be secured by mortgage on the real estate of said bank, which loan said Johnson declined to make. The said Johnson admits that on the 5th of December, 1873,

he sent his stock to the bank, with the power and direction to have the same transferred to the defendant, Mrs. Valentine; but he denies that such transfer was made to exonerate himself from liability to the creditors of said bank. The defendants also admit that they were informed that the actual transfer of said stock upon the books of the bank, as directed by said Johnson on the 5th December, 1873, was delayed for some time, but assert that the said transfer was so delayed without the knowledge and against the will of defendants. The defendants further deny that the transfer of said stock was made without legal consideration, or with any view to exonerate the said Johnson from liability as a stockholder aforesaid. They also deny that Betsey Valentine is or was at the time of said transfer known by said Johnson to be utterly insolvent, or that such transfer was made with a view of defrauding the creditors of the bank, but, on the contrary, they assert that it is not true that the said Betsey Valentine was at the time of said transfer insolvent, or that the said transfer was made for any such purpose as alleged in the bill, but was made in good faith and for a valuable and lawful consideration. And they also deny that the said Johnson was one of the owners of the capital stock of said bank on the 25th of May, 1874.

The answer is sworn to by both defendants. A general replication having been filed and proofs taken, the cause came before the court below on final hearing.

The following provisions of the national bank act, taken from the Revised Statutes, are those most referred to in this connection:

"SEC. 5139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and be transferable on the books of the association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights

and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies, or securities of the existing creditors of the association shall be impaired.

"SEC. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for the other, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value, in addition to the amount invested in such shares." * * *

REMEDY IN EQUITY.

The suit is brought by the receiver, in pursuance of the direction of the Comptroller of the Currency, to enforce the personal liability of the defendant Johnson as a stockholder of the bank. The order of the Comptroller directing the enforcement of the individual liability of the shareholders is conclusive. It cannot be controverted in suits against them. (Casey *v.* Galli, 4 Otto, 677.) The amount ordered to be paid bears interest from the date of the order. (*Id.*)

The subject-matter involves a trust fund, which the defendants, by elusive and fraudulent practices, seek to withdraw beyond the reach of the *cestui que trust*. The relief asked is to set aside a pretended and deceitful transfer of stock, and to hold the transferor responsible to the creditors of the corporation, as though his name stood on the list of shareholders; and in order that full and exact justice may be done, the transferor and the transferee are both brought into court.

The transferee, as registered holder, is clearly liable. By holding herself out to the world as owner, as she did when she permitted her name to appear to that effect on the books kept for the information of shareholders and creditors, she estopped herself from denying that she is in fact what she represented herself to be. This does not, however, impair the liability of the transferor, if the transfer has been colorable or made to an irresponsible person with intent to evade his statutory obliga-

he sent his stock to the bank, with the power and direction to have the same transferred to the defendant, Mrs. Valentine; but he denies that such transfer was made to exonerate himself from liability to the creditors of said bank. The defendants also admit that they were informed that the actual transfer of said stock upon the books of the bank, as directed by said Johnson on the 5th December, 1873, was delayed for some time, but assert that the said transfer was so delayed without the knowledge and against the will of defendants. The defendants further deny that the transfer of said stock was made without legal consideration, or with any view to exonerate the said Johnson from liability as a stockholder aforesaid. They also deny that Betsey Valentine is or was at the time of said transfer known by said Johnson to be utterly insolvent, or that such transfer was made with a view of defrauding the creditors of the bank, but, on the contrary, they assert that it is not true that the said Betsey Valentine was at the time of said transfer insolvent, or that the said transfer was made for any such purpose as alleged in the bill, but was made in good faith and for a valuable and lawful consideration. And they also deny that the said Johnson was one of the owners of the capital stock of said bank on the 25th of May, 1874.

The answer is sworn to by both defendants. A general replication having been filed and proofs taken, the cause came before the court below on final hearing.

The following provisions of the national bank act, taken from the Revised Statutes, are those most referred to in this connection:

"SEC. 5139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and be transferable on the books of the association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights

and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies, or securities of the existing creditors of the association shall be impaired.

"SEC. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for the other, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value, in addition to the amount invested in such shares." * * *

REMEDY IN EQUITY.

The suit is brought by the receiver, in pursuance of the direction of the Comptroller of the Currency, to enforce the personal liability of the defendant Johnson as a stockholder of the bank. The order of the Comptroller directing the enforcement of the individual liability of the shareholders is conclusive. It cannot be controverted in suits against them. (Casey *v.* Galli, 4 Otto, 677.) The amount ordered to be paid bears interest from the date of the order. (*Id.*)

The subject-matter involves a trust fund, which the defendants, by elusive and fraudulent practices, seek to withdraw beyond the reach of the *cestui que trust*. The relief asked is to set aside a pretended and deceitful transfer of stock, and to hold the transferor responsible to the creditors of the corporation, as though his name stood on the list of shareholders; and in order that full and exact justice may be done, the transferor and the transferee are both brought into court.

The transferee, as registered holder, is clearly liable. By holding herself out to the world as owner, as she did when she permitted her name to appear to that effect on the books kept for the information of shareholders and creditors, she estopped herself from denying that she is in fact what she represented herself to be. This does not, however, impair the liability of the transferor, if the transfer has been colorable or made to an irresponsible person with intent to evade his statutory obliga-

tions. (Davis, Receiver, *v.* Stevens; Brown's National Bank Cases, 2, p. 158; same case, 17 Blatch., C. Ct., 259.)

To adjust all these complications in the recovery and administration of a trust fund, and to prevent a multiplicity of suits and ruinous delays, is peculiarly within the jurisdiction and power of a court of equity. (United States *v.* Meyers, 2 Brock, 519; Adams' Equity, 26; Bowden, Receiver, *v.* Santos, 1 Hughes, 160; Johnson *v.* Laflin, 103 U. S., 800; Thompson's Liability of Stockholders, secs. 13 and 14; Wood *v.* Dummer, 3 Mason, 313; Adler *v.* Milwaukee Patent Brick Co., 13 Wis., 62; Wright *v.* Petrie, 1 Smed. and M., ch. 282; Hightower *v.* Mustian, 8 Ga., 506; Allen *v.* Montgomery R. Co., 11 Ala., 437; Nathan *v.* Whitelock, 9 Paige, 153.)

ABSTRACT OF TESTIMONY.

Before referring to the law of the case, reference will be made to the material facts as shown by the testimony. They are few and simple.

In the latter part of the year 1873, soon after the memorable "panic" had begun to sweep over the country, carrying down the largest fortunes and banking institutions in the land, the First National Bank of Norfolk found itself "in a straitened condition;" a "loan was urgently needed." So anxious were the officers of the bank to effect a loan that they were earnestly endeavoring to raise the sum of $25,000 by a mortgage on the banking building in Norfolk, they having no other security to offer for comparatively so small a sum.

In this state of affairs the then president of the bank, Col. Wm. Lamb, wrote to a former president of the bank, Mr. C. L. Cole, at that time living in New York, to solicit his aid in the all-important matter of effecting a loan. Mr. Cole replied that he had a friend, Mr. J. C. Johnson, (the defendant,) who was *able to make the loan*, and who "*would do so* if proper representation could be made to him." He promised to take Mr. Johnson to Norfolk, that the subject of the loan might be dis-

cussed. Accordingly, in the latter part of November, 1873, Mr. Johnson, accompanied by Mr. Cole, visited Norfolk, where several days were spent, a portion of each day being spent in the private office of the president of the bank. During these interviews much "confidential conversation" took place between the president and Mr. Johnson touching the affairs and condition of the bank. Indeed, it was of such confidential character as, according to the testimony of President Lamb, he "would have only had with one largely interested in the bank." Mr. Johnson was informed that the capital stock of the bank had been seriously impaired "by the Elkton suit" and other litigation; that *the panic had occasioned* the loss of business; and, in short, that the bank was "*very hard up*," and desperately in need of ready money to recover its position. (See Record, pp. 26–7–8.)

The representations of President Lamb were reinforced by the reports and statements of the bank "called for for use in the president's room." (P. 48.)

At the conclusion of these interviews Mr. Johnson promised to look into his affairs upon his return to his home in New Jersey, and to make the loan if he could conveniently do so. (P. 28.) Mr. Johnson returned home, but a change, seemingly as sudden as the conversion of Paul, came o'er the spirit of his dreams; for by the first mail by which it could be sent he dispatched a letter to the president of the bank, not containing the loan, but information that he had disposed of his stock in the bank, and requesting the same to be "transferred to Mrs. B. Valentine." (P. 68.)

The president hesitated to make the transfer of the stock, but finally did so, and in a letter addressed to Mr. Johnson, enclosing the new certificates, made out in Mrs. Valentine's name, distinctly informed him that the bank could not go on as things then were, and intimated that it must go into the hands of a receiver. (P. 69.)

The insolvency of Mrs. Valentine, for years an inmate of Mr. Johnson's house, and her utter inability to respond to the

demands of the creditors of this broken bank on account of these shares, is fully proven by her own deposition, corroborated by the testimony on that point of Mr. Johnson's friend, Mr. Cole. (Pp. 68 and 85.)

If her statement is believed, she gave in exchange for these shares of stock all the estate she possessed in the world, to wit, the compensation due her by Mr. Johnson for looking after his clothes! She is unable to swear that she at that time possessed, or has since come into possession of, any other estate out of which the claims of creditors can be satisfied. She was divorced from her husband, who, as Mr. Cole says, was a *poor man*. Her subsequent employment seems to have been attending to Mr. Johnson's wardrobe, for which distinguished service it can hardly be presumed she realized more than the high figures she gives in her deposition.

The result is, therefore, as shown by the testimony, that Mr. Johnson, finding the condition of the bank to be as it was in the latter part of the year 1873, deliberately transferred his shares to a bankrupt, in satisfaction of a debt due by him to the transferee, and with them the obligations resting upon him for the indebtedness of the bank—an easy way of at once discharging *a sacred duty* (1 Otto, p. 47,) and one's debt, it must be admitted!

ARGUMENT.

Applying to these facts the well-settled law of the case, it is difficult to see in what the complainant has failed in fully making out his case, and his claim to the relief for which he prays in his bill.

That the capital stock of a moneyed corporation is *a trust fund* for the benefit of creditors, is a doctrine now too well settled to require argument.

In the case of Sawyer *v.* Hoag, 17 Wall., 620, it is said by the Supreme Court: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund

for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen."

The doctrine has been fully established in this country since Judge Story's decision in Wood *v.* Dummer, 3 Mason, 305.

The Supreme Court has of late repeatedly decided in the same way, notably in the recent cases of Upton *v.* Tribilcock, Sawyer *v.* Upton, Webster *v.* Upton, 1 Otto, 45, 56, 65.

In the first case, at p. 47, the court says: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a *trust fund*, &c. * * * It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This *duty is a sacred one*, and cannot be disregarded. Its violation will not be undertaken by any just-mined man, and will not be permitted by the courts."

At page 60 the capital stock of a corporation is again declared to be a trust fund, upon which *creditors have a lien in equity.*

Hence the mere assignment of stock is not of itself sufficient to relieve the assignor of liability as a stockholder, and such assignments should be subject to a rigid scrutiny, and, if found to be unfair, or calculated to screen the stockholder from liability at the expense of the general creditors, they should be annulled. (17 Wall., 623.)

The ground of the liability of stockholders is *the credit* which the company has gained on the strength of their implied promise to raise a fund to enable it to comply with its engagements. (Ang. & Ames on Corporations, sec. 603.)

All attempts, as the reports show, on the part of stockholders to avoid liability by a transfer of their stock, to the prejudice of creditors, invariably prove unsuccessful.

It is very clear that a transfer of stock to *a bankrupt* will not defeat the claims of creditors against the assignor. "Otherwise, the wholesome provision for the security of creditors would be unavailing at the very time and under the very circumstances in which it was intended to operate." (A. & A. on Corporations, sec. 623.)

See a strong case to the same point in 9 Paige, 152; Nathan, Receiver *v.* Whitlock, affirming same case, 3 Edw. Chan., 215.

In that case a shareholder having transferred his stock, without knowing at the time that the company was insolvent, to an irresponsible person, the assignment was held by the court to be invalid, because—

1. It was a fraud upon the rights of creditors.

2. It was a fraud upon the law.

3. It was a fraud upon *innocent stockholders*, who had a right to insist that all loss occasioned by the failure of the concern should be borne *ratably by all the stockholders.*

In that case a valuable consideration was paid for the transfer of the stock, which inured, in whole or in part, to the benefit of the company.

In this case not only did no consideration inure to the benefit of the bank by reason of Johnson's assignment, but all the estate possessed by the transferee was exchanged for the shares, leaving the latter with absolutely no property at all.

See a similar case, (*Ex-parte* Bennett,) 27 English Law and Equity Reports, p. 572.

In this case, (*Ex-parte* Bennett,) a large body of the stockholders at the time the transfers were made believed the concern would turn out to be profitable. (See p. 573.) Moreover, the transfers were made for a valuable consideration which inured to the benefit of the company.

The assignments, notwithstanding made with the assent of the directors of the company, and without believing the company to be insolvent, were held invalid as against the claims of creditors.

Any assignment to the prejudice of creditors is, as against them, void. (A. and A. on Corporations, sec. 535.)

See also *Ex-parte* Walker, 39 Eng. L. and Eq. Reports, 576, &c.

The capital stock of a corporation being a *trust fund*, it follows that the holders thereof are *trustees*, for the benefit of creditors.

Now, nothing is better settled in a court of equity than that a trustee is at all times and under all circumstances bound to act with reference to the trust subject in *the strictest good faith*. He can, under no circumstances, be permitted to make advantage for himself, at the expense of the *cestui que trust*, out of the estate or fund committed to his charge, nor will he be allowed to stand in the way of temptation. Hence purchases by trustees of any portion of the trust subject are generally held to be void. In Hill on Trustees, marg. p. 537, the author, after referring to the rule that the *cestui que trust* may deal with his trustee so that the latter may become the purchaser of the estate, says: "But in all cases of purchases by trustees from their *cestui que trusts*, where the equity is not barred by acquiescence or confirmation, the court will carefully inquire into and sift all the circumstances, in order to ascertain the perfect fairness and propriety of the transaction; and *it will rest with the trustee to establish in evidence* that according to the rule just referred to the purchase is such a one as a court of equity will sustain."

Indeed, it is well settled that a trustee must be prepared to show the fairness of all his transactions respecting the management and disposition of the "trust fund." (Adams Eq., 60, 61, and 184.) The *onus* of proving the fairness of his acts is always upon the trustee. These principles apply to guardians, attorneys, cashiers of banks, directors, promoters of industrial enterprises, &c. (Lead. Cases in Eq., 4th ed., 260, 261.)

So far is the doctrine of trusts carried in a court of equity that a voluntary deed made by a person indebted at the time

is, if he afterwards prove insolvent, void as against existing creditors. Nor will the attacking creditor be required to show *actual* fraud. (Reade *v.* Livingston, 3 Johns. Ch. Rep., 481.)

If a trustee cannot *acquire* any portion of the trust subject without satisfying a court of equity that "the purchase is such as a court of equity will sustain," *a fortiori* must the rule require him to show the strict fairness of the transaction when he entirely *parts with* the fund he holds in trust for others; especially when the transaction is attacked by the *cestui que trusts* as fraudulent and prejudicial to their interests, and to the advantage of the trustee himself.

Such being the settled rule in courts of equity respecting the conduct of all who stand in the position of trustees, and no testimony having been introduced by the defendants to show the ability of Mrs. Valentine to respond to the demands of creditors of the bank, and to bear ratably with the other stockholders the loss caused by the failure of the bank, it is respectfully submitted that the complainant is entitled to the relief for which he prays. For it must be borne in mind that the insolvency of the bank at the time the shares were transferred is admitted (by not being denied) in the answer. Hence a liability, although the extent thereof had not then been ascertained, rested upon the defendant Johnson, as a stockholder, to the creditors of the bank. This, of course, necessarily results from the admission and proof of the insolvency of the bank at that time.

"When debts are incurred, *a contract* arises with the creditors that the stock shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied." (1 Otto, 60.)

But he (Johnson) contends that he is not liable on account of these shares. Why? Because of their transfer to Mrs. Valentine. But his liability cannot have been discharged by that transfer unless Mrs. Valentine at the time was able to make good that liability which was sought to be transferred to

her along with the shares. That fact I have attempted to show by the authorities it is incumbent upon Johnson, the holder of a *trust fund*, with an intimate knowledge of the pecuniary standing of his transferee, and not upon the representative of his *cestui que trusts*, the creditors of the banks, "to establish in evidence" to the satisfaction of the court.

Indeed, it is a well-established general rule, that whenever *in any case* a defendant in his answer admits a liability to have rested on him to the complainant, but contends that it has been discharged, that averment in the answer must be proved by him, and the answer is not evidence of the fact. (See note to Hart *v.* Teneyck, 2 Johns. Ch. Reports, 92; Clements *v.* Moore, 6 Wallace, 315.)

The law applicable to the transfer of shares has been laboriously and exhaustively collected and summarized by Mr. Thompson in his "Liability of Stockholders," chap. XIII. In section 211 he says:

"The general right of a shareholder to transfer his shares is subject to this limitation: that a fraudulent transfer, made with a view to avoid his liability to the company or to creditors, is void, and leaves him still liable. It will be necessary, however, to qualify a proposition thus stated in a very general way. After much consideration of this subject, the English courts have settled upon the rule that a man may transfer his shares to *a man of straw* at a time when the company is in a failing condition, for the sole purpose of escaping liability and for a nominal consideration merely or as a mere gift; and if the transfer is out and out—is not merely colorable—a sham, the transferee remaining a trustee for the transferor—the device will be successful; the transferor will escape liability as a contributory, and honest shareholders and creditors will suffer accordingly. But if the transaction is merely colorable, if, in fact, the transferee is a mere nominee of the transferor, so that as between themselves there has been no real transfer, but in the event of the company becoming prosperous the transferor would participate in the profits, the transfer will be held for nought, and the transferor will be put upon the list of contributories."

The American doctrine is more stringent and more in accord with sound morals and honest dealing. Mr. Thompson states it in section 215 as follows:

"A transfer of shares in a failing corporation made by the transferor with the purpose of escaping his liability as a shareholder to a person who, from any cause, is incapable of responding in respect of such liability, is void as to creditors of the company and as to other shareholders, although as between the transferor and the transferee the transfer may have been out and out. This conclusion necessarily results from the American doctrine that the capital stock of a corporation is a trust fund for the security and benefit of creditors. This fund consisting not only of money which has been paid in on account of stock, but also of money which subscribers have agreed to pay in, it is obvious that a court of equity will not allow that portion of it which consists of unpaid subscriptions to be frittered away by the transfer of shares from solvent to insolvent persons, with the mere purpose of escaping the obligations arising out of the contract of subscription and accruing to creditors. Such an arrangement cannot stand, even if done with the consent of the board of directors, because the giving of such consent would involve a breach of trust on their part."

Nathan *v.* Whitlock, 3 Edw. Ch., 215, affirmed on appeal, 9 Paige 152.

Provident Savings Inst. *v.* Jackson Place Skating Rink, 52 Mo., 557.

McClaren *v.* Franciscus, 43 Mo., 452.

Miller *v.* Great Republic Ins. Co., 50 Mo., 55.

Marcy *v.* Clark, 17 Mass., 330.

Johnson *v.* Laflin, 5 Dillon, C. Ct., 65; same case, 102 U. S., 800.

These views were expressly adopted by this court in National Bank *v.* Case, 99 U. S., 631, with a declaration from Mr. Justice Strong, who delivered the opinion, that they were sustained by the adjudicated cases.

It will be observed, upon a reading of the American cases, that they lay the principal stress on the question of an *intent* on the part of the transferor to escape liability. "We cannot

doubt," said Parker, C. J., "that a transfer of an interest in the stock of such corporation, not *bona fide*, but for the purpose of defeating the creditors of the company, is fraudulent and void. Otherwise the wholesome provision of the statute for the security of creditors would be unavailing at the very time and in the very circumstances in which it was intended to operate." (Marcy *v.* Clark, 17 Mass., 334.) "On general principles," said Dillon, in a well-considered case, "there may also be an implied prohibition against the transfer of shares to a pauper or man of straw, or insolvent person, for the fraudulent purpose of escaping liability." (Johnson *v.* Laflin, 5 Dillon, C. Ct., 65.)

The same learned judge, in concluding his judgment in the same case, "in order to preclude erroneous inferences," added: "While we maintain the right of a shareholder to dispose of his shares absolutely by an out and out sale and register transfer, and thus escape liability, provided the sale is made *bona fide* and the purchaser is in law capable of assuming the liabilities of the transferor, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferor knows will make the transfer, if it is sustained, work a fraud upon other shareholders, or upon the creditors of the bank." "The law is well settled; the point is very clear," said Wagner, judge, "that no member can exonerate himself from liability or defeat the claims of creditors by transferring his interest to an insolvent person or bankrupt. The members of a corporation, therefore, who would be liable, if they continued members to the creditors of the corporation, may be treated as members if they have disposed of their interest to an insolvent, or with the view of exonerating themselves from their personal liability."

McClaren *v.* Franciscus, 43 Mo., 467, quoted with approval in Provident Savings Inst. *v.* Jackson Place Skating Rink, 52 Mo., 558.

The intent is generally incapable of direct proof, for the

reason that a person who will make a fraudulent conveyance to escape liability to creditors will seldom hesitate to commit the necessary perjury to sustain it. Such intent must, therefore, be inferred from circumstances. The circumstance that the corporation or transferee, or both, were at the time notoriously insolvent would, it should seem, be sufficient to warrant the inference of such an intent. "If the stockholder knew of the insolvency (of the purchaser) at the time of the transfer, it would be very strong evidence of fraud, and it would be hard to resist the conclusion that such transfer was made in bad faith." (Adams, J., in Miller *v.* Great Republic Ins. Co., 50 Mo., 67.)

In a recent case, in which the judgment was given by the chief justice of this court, a party who caused certain shares in a national bank to be entered upon the stock ledger of the bank in the name of his employé, himself never appearing as holder, though the real owner, was held bound to respond to a demand for statutory contribution. (Davis, Receiver, *v.* Stevens, 17 Blatch., C. C., 259.)

Accepting the rule laid down by Mr. Thompson and approved by this court as the correct one, there are but three facts the complainant need establish as of the time when the transfer from Johnson to Mrs. Valentine was attempted, to wit, December, 1873. They are:

1st. That the bank was then in a failing condition.

2d. That Mrs. Valentine was incapable of responding to the statutory liability; and

3d. That Johnson attempted to tranfer his stock with the purpose of escaping his responsibility as a stockholder.

The first is alleged in the bill, is not denied in the answer, and is amply proved in the testimony; (see testimony of Lamb, president; Chamberlain, cashier; and Hunter, bookkeeper, pp. 26-46;) the second is established beyond controversy by the testimony of Mrs. Valentine herself, (p. 85,) and the third follows irresistibly from Johnson's knowledge of the two former and the circumstances.

Johnson admits in his answer that he became the purchaser of 130 shares of stock in the year 1869. That amount of stock was large enough to keep his attention fixed upon the bank and to direct his inquiries toward it. He knew that he had received no dividend after 1872. He was the friend and intimate of C. L. Cole, a former president of the bank, and in November, 1873, was brought by Cole, at the instance of Lamb, then president, to Norfolk, to consult about the condition of the bank and in the hope and expectation that he, Johnson, would advance funds upon the security of the real estate. Cole and Johnson remained in Norfolk two or three days; they were in the bank several times. (Testimony of Chamberlain, p. 38.)

Frequent and long interviews were had in the president's room between Johnson, Cole, and Lamb of such a confidential character as would only be had between persons largely interested in the bank. Statements were submitted and examined and explanations made, and all the books, papers, and assets of the bank were open to their inspection. They were on the very spot where information could be most readily obtained. Johnson had every inducement to inquire, and Lamb and Cole had every inducement to make known all they knew. The effort of Lamb and Cole was to save the bank, and it was for the interest of Johnson to aid them in saving it. Lamb says: "I told him that the need of a loan was urgent; that I thought the security was good, and I appealed to him as a stockholder to make the loan." "My impression is that I called attention to the fact that our capital had been seriously impaired by the Eckton suit and other litigation, and that the panic had caused us to lose business and be very hard up, and the necessity of having ready money to retain our business and to recover our position. I think I asked for a loan of $25,000 on the building. My commission (conversation) was of such a confidential character as I would have only had with one largely interested in the bank." "I cannot remember the details of the conversation, but urged the loan by him on the

ground that it was urgently needed." "I don't remember whether he examined the books and papers of the bank, but I know that I expected and desired him to make all proper inquiries, which he had a right to do as a stockholder, into the condition of the bank." "My impression is that I gave him a general idea of the condition of the bank when making a request for the loan, but I expected him to get the details from the cashier or other officers of the bank." "I was under the impression that Mr. Johnson was brought to Norfolk by Mr. Cole to look into the matter of making us a loan, and was disappointed that Mr. Johnson went away without consummating it." "He promised when he returned to look into his affairs, and, if he could conveniently do so, promised to make the loan."

What follows? Johnson returned home, fully posted as to the condition of the bank, its necessities, its peril, its insolvency, and immediately transfers all his shares to his mother-in-law and housekeeper for more than six years, for a consideration which, to say the least of it, was open to grave suspicion, and without the payment of a single dollar in money, and on the 5th December addresses a letter to Lamb, declining to make the loan, and enclosing his certificate with a power of attorney to transfer his stock. If these facts do not import knowledge on the part of Johnson, both as to the condition of the bank and the inability of Mrs. Valentine to respond to any demand for contribution, how can such knowledge ever be shown, or the *animus*, the intent, ever be evolved? And yet "the intent is generally incapable of direct proof, for the reason that a person who will make a fraudulent conveyance to escape liability to creditors will seldom hesitate to commit the necessary perjury to sustain it. Such intent must therefore be inferred from circumstances." (Thompson on Liability of Shareholders, section 215.)

It is worthy of remark that the power of attorney was sent direct to Lamb by Johnson. There is no evidence that the certificate and power were ever delivered to Mrs. Valentine.

The transfer, even as between the parties, was not complete until these papers were received by Lamb, and a reasonable time given to effect the entries on the books. For the purposes of the transfer, therefore, Lamb was the agent of Johnson, and the latter as principal became chargeable with the knowledge of the agent with respect to the condition of the bank. (Johnson *v.* Laflin, 103 U. S., 803.)

OPINION OF THE COURT BELOW.

The learned judge below takes the ground in his opinion that the testimony and circumstances do not outweigh the denials of the answer, and that therefore the bill should be dismissed.

The material facts are covered by the following clauses of denial in the answer:

1st. "That the said Jacob C. Johnson then during that visit, (to Norfolk,) or at any other time, saw anything in the condition of the said bank, except that William Lamb, who was at that time the president of the said bank, and who went with the defendant, Jacob C. Johnson, to inspect the farm aforesaid, at the same time proposed that this defendant should loan to the said association the sum of $25,000, and proposed to secure the said loan by mortgage on the real estate of the said bank, which loan this defendant declined to make."

2d. "That the said defendant Betsey Valentine is or was at the time of said transfer known by said Jacob C. Johnson to be utterly insolvent."

The first of these denials cannot be accepted as true if it be tried by the tests of probability and experience. That Johnson was in the office of the president in company with Cole and Lamb is proved by Chamberlain and Hunter and confirmed by Lamb, whose statements are of such a character that they cannot be true if the answer be true. Lamb's testimony and the answer are totally irreconcilable, and Lamb has this advantage, that the probabilities are all on his side and all against Johnson. It is impossible to conceive on any rea-

sonable theory of human action of an intelligent man the owner of 130 shares of bank stock, which he had held for four years, and which had not paid him a dividend for nearly two years, going three hundred miles from his home to the bank, closeting himself therein repeatedly with an ex-president and the active president, and discussing with them a loan, which they desired him to make the bank,—the stockholder having all the while the best opportunities and means for information at his command and thrust upon his attention,—who would not post himself upon the present condition and future prospects of the association to the utmost of his capacity. The case is outside the pale of human credulity. On the other hand, how easy is it to believe that Johnson would be prompted by self-interest to deny just what he has denied in order to save himself from a demand which now amounts to nearly $20,000?

Then, as to the second point, who can doubt that Johnson knew of the insolvency of Mrs. Valentine in the sense that she was not able to pay any demand on behalf of the creditors of the bank? She admits that she was wholly without means for that purpose. (See her testimony, p. 85.) She was his mother-in-law, living in his house for the six years last preceding his transfer to her, and it is incredible that Johnson could have so far closed his eyes and ears as not to know that she was wholly without means, except what she derived from him.

If, then, Johnson's answer be false in these particulars, what becomes of its credibility in other respects? If his oath be not true as to facts, what reliance can be placed upon it when he comes to speak of his hidden intent, which can only be truly determined by correctly ascertaining those facts? If we would arrive at truth, there can be no better means employed to correct the bias which interest gives to human testimony than to apply the tests of probability and consistency; and when these have brought us to a clear and honest conviction, all mere artificial rules should thenceforth be ignored, because they would only engender doubts where none should exist, and

serve no other purpose than to "entangle justice in her net of law."

We contend that the proof and the attending circumstances destroy the defence set up in the answer, and that therefore the transfer should be set aside and the defendants decreed to pay to the complainant the par value of the shares, ($13,000,) with interest thereon from the date of the order of the Comptroller of the Currency directing the individual liability of the shareholders to be enforced, (94 U. S., 677;) that is to say, from August 13, 1875.

JNO. A. J. CRESWELL,
Of Counsel for Appellant.

17-257

WARD & TICHENOR, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

OFFICE SUPREME COURT U. S.
JAN 19 1883
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

GEORGE E. BOWDEN, RECEIVER OF THE FIRST NATIONAL BANK OF NORFOLK, VA., *Appellant,* *and* JACOB C. JOHNSON AND BETSEY VALENTINE, *Appellees.*	*No. 166.* *On Appeal from the Circuit Court for the District of New Jersey.*

Brief on Motion to Dismiss the Appeal.

STATEMENT.

The final decree of the Circuit Court appealed from, was rendered on the 16th day of January, 1879, the cause having been heard in March, 1878. (Record, p. 47.)

The appeal was allowed, and citation issued on the 10th day of October, 1879. (Page 1.)

The bond on appeal was executed by Orson Adams, on the 10th day of October, 1879, and was on that day approved by the Judge. (Record, p. 2.) The condition is, that Bowden shall prosecute his appeal, &c.

It now appears that by an order of the Comptroller of the Currency, dated June 1st, 1878, Bowden was removed and Orson Adams appointed receiver in his stead.

See certified copy of order annexed to the motion papers, marked Exhibit A.

I.

The effect of such proceeding was to deprive Bowden of all authority as receiver, and of all right to interfere in the case by way of appeal.

Taylor, et al., vs. *Savage Exrs.*, 17 Pet., 224.
S. C., 1 How., 282.

The obtaining of the allowance of the appeal in the name of Bowden, receiver, was a fraud upon the Court, and Bowden no longer having any right to intervene in the case, the appeal is not properly here, and should be dismissed.

Adams, who was then the receiver, and who, by giving the bond and thus obtaining the appeal in Bowden's name, is responsible for the fraud, cannot be admitted as a party now.

He should have applied to the Circuit Court to be substituted while the cause was pending there.

McLane vs. *Boon*, 6 Wall., 244.
Barribeau vs. *Brant*, 17 How., 46.

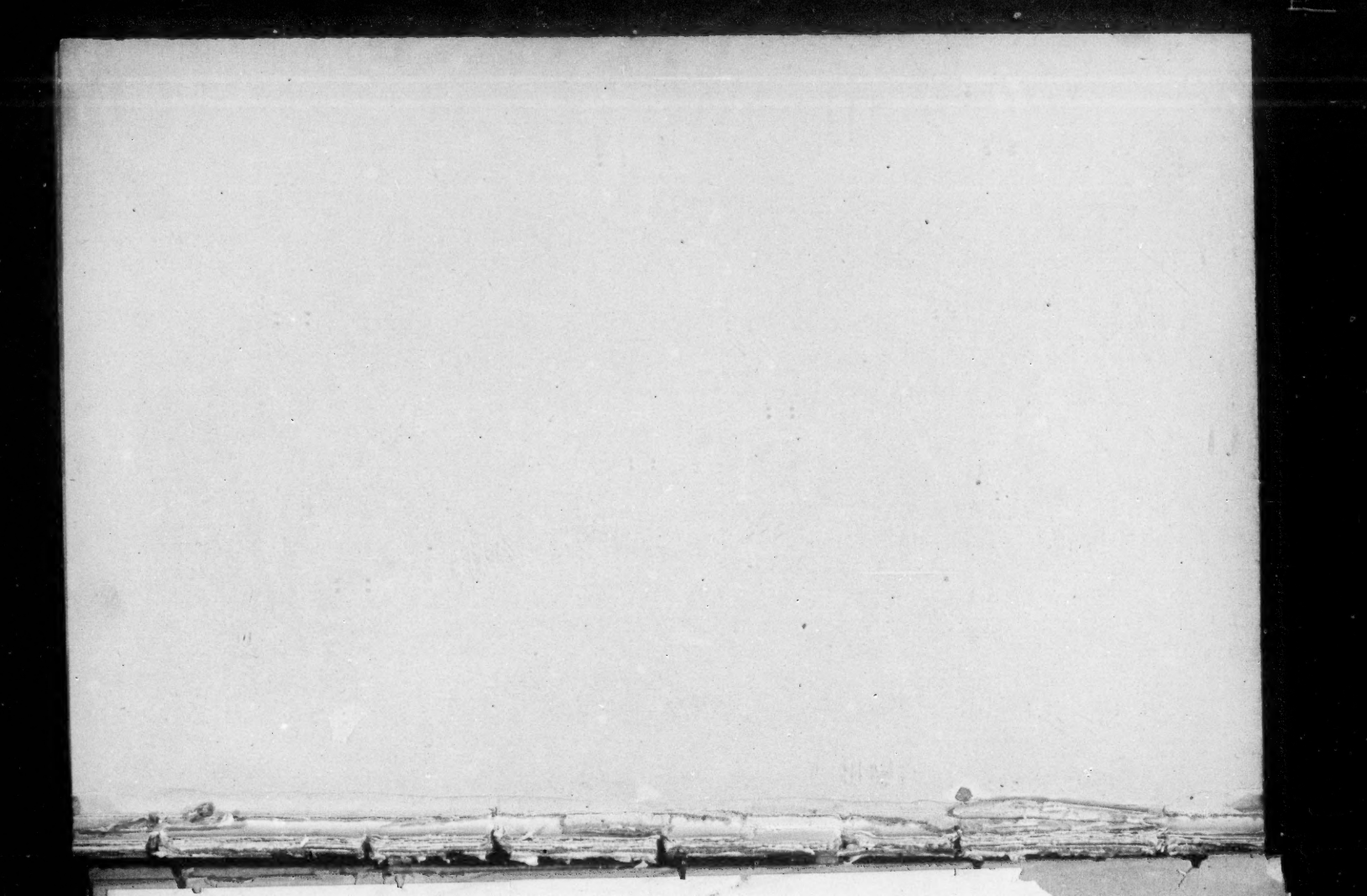
II.

The Court will entertain the motion now, because it was made at the first possible moment after the fact came to the knowledge of the appellees' counsel.

Bowden has no standing at all, and Adams cannot complain of the delay, because he was responsible for the ignorance of the appellees and their counsel, as to the true state of the case.

See affidavit of Thomas N. McCarter, and copy of petition referred to in said affidavit and thereto annexed, and marked Exhibit B.

Thomas N. McCarter
Counsel for Appellees



OFFICE SUPREME COURT U.S.
FILED
JAN 10 1883
JAMES H. McKENNEY, CLERK

Supreme Court of the U. S.

GEORGE E. BOWDEN,
Receiver of the First National Bank of Norfolk, Va.,
Appellant,
and
JACOB C. JOHNSON and BETSEY VALENTINE,
Appellees.

No. 166.

On Appeal from a Decree in Equity rendered by the Circuit Court of the United States for the District of New Jersey.

BRIEF FOR THE APPELLEES,

By THOMAS N. McCARTER, of Counsel for Appellees.

NEWARK, N. J.:
WARD & TICHENOR, LAW CASE PRINTERS, 832 & 834 BROAD ST.
1883.

WARD & TICHENOR, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

Supreme Court of the United States.

GEORGE E. BOWDEN, RECEIVER OF THE FIRST NATIONAL BANK OF NORFOLK, VA.,
Appellant,
vs.
JACOB C. JOHNSON AND BETSEY VALENTINE,
Appellees.
No. 166.

On appeal from a decree in equity rendered by the Circuit Court of the United States, for the District of New Jersey.

BRIEF FOR THE APPELLEES.

STATEMENT

This cause was heard in the Circuit Court for the District of New Jersey, before Hon. WILLIAM MCKENNAN, Circuit Judge, and the Hon. JOHN T. NIXON, District Judge, on the bill, answer and proofs, and a final decree was rendered therein on the merits, dismissing the bill of the appellant, who was the complainant below; the decree bears date January 16, 1879. (Record, page 47.)

The material allegations of the bill and answer are stated with substantial correctness in the brief for appellant, on pages 2, 3 and 4, and need not be restated here.

ARGUMENT.

I.

THE DECREE IN THIS CAUSE SHOULD BE AFFIRMED FOR THE REASONS STATED IN THE OPINION OF THE CIRCUIT COURT.

It is manifest from the facts, as stated by appellant's brief, and in the opinion of the Court below, and from an

examination of the record, that the equity of the bill and the appellant's right to a decree, rests on his establishing to the satisfaction of the Court his allegation that the defendant, Johnson, having become aware of the insolvent condition of the bank, with a view to exonerate himself from liability as a stockholder, and to defraud the creditors of the bank, fraudulently, and without consideration, transferred his stock to his co-defendant, Mrs. Valentine, who, at the time of such transfer, was known by him to be insolvent and unable to respond to the creditors of the bank.

Section 5151, of the National Banking Act, imposes the liability of the debts of the bank on the shareholders, who are, by section 5139, declared to be those who become such by a transfer on the books of the bank, and the person so becoming a stockholder by transfer, succeeds to all the liabilities of the prior holder.

It is not disputed that on the 5th of December, 1873, Johnson executed to Mrs. Valentine a transfer of his stock, which on the 15th of January, 1874, was duly transferred to her on the books, and remained in her name until the bank failed, which was not until the 26th of May, 1874.

Unless, therefore, appellant can establish that such transfer was so fraudulent as to be void against the creditors of the bank represented by him, the transfer of the stock operated to transfer the liability to defendant, Valentine, and to exonerate Johnson.

The burden of establishing this fraud the appellant assumed by his bill, and, as a logical conclusion therefrom, he only asks a decree against Johnson, and does not by his bill attempt to recover from Mrs. Valentine.

Has he succeeded in establishing, according to the rules of evidence which prevail in equity cases, the truth of his allegations?

It will be observed that the bill calls for a sworn answer, and defendants have answered under oath; they have distinctly and fully denied all the allegations of the

bill tending to show fraud in the transfer, and the answer being directly responsive, brings the case under the operation of the well known rule of evidence that such an answer must be taken as true, unless complainant can overcome its denials by the testimony of two witnesses, or by one witness, and corroborating circumstances equivalent to the testimony of another witness.

This rule is correctly stated in the opinion of the Court, on page 44 of the record, and the authorities supporting it are there stated, if any were necessary.

It has been so recently enforced in this Court in the case of *Vigil* vs. *Hopp*, 104 U. S., 441, that nothing further need be cited in its favor.

It is claimed on the part of the appellees, that the evidence offered by complainant utterly fails to establish such a fraudulent transfer, without relying on the additional force which the answer gives to the defendants' view of the case.

Much less does it operate to overcome the answer.

It is not my purpose, at this time, to enter into a critical discussion of the evidence relied on by complainant.

It is insisted that it is fully and fairly stated in the opinion of the Court below, and fully justifies the conclusion which the Court reached, which was that the bill should be dismissed, because the complainant below failed to establish his case by the evidence.

That decision being on a pure question of fact, and one about which the Court below was very clear, (p. 47) it will have such strength with this Court, that it will require the clearest and most satisfactory evidence that the Court below was in error, to induce this Court to reverse its decision.

In the case of *Taylor* vs. *Harwood*, Taney's Circuit Court Decisions, page 446, the late Chief Justice TANEY uses this language:

"So far, I have treated this case as if it were a new one, coming as an original cause before this Court with-

out any previous examination or decision. But this is not the point of view in which the Court regards it; it is an appeal from the District Court, and the judgment of that Court is to be regarded as correct, unless the appellant can show it to be erroneous; the burden of proof is upon him. In a case like this, which is purely a question of fact, depending upon the testimony of a multitude of witnesses whose statements are often inconsistent with each other in material and essential particulars, and whose relative title to credibility is to be carefully weighed and scrutinized, *nothing less than the firmest and clearest conviction that the District Court had fallen into error, could justify this Court in reversing its judgment*, and the more especially when, as in this case, it appears from the written opinion filed by the Judge, that the whole case was most carefully and elaborately considered and decided in that Court."

The like rule is declared in many cases, among which are the following:

United States vs. *112 Casks of Sugar*, 8 Peters, 278.
Walsh vs. *Rogers*, 13 How., 284.
Mann vs. *Rock Island Bank*, 11 Wall., 650.
" *The Grafton*," 1 Blatchf., 178.
" *The Sampson*," 4 Id., 29.
The Ship Marcellus, 1 Black., 417
" *The Waterwitch*," Ibid., 500.
In re Mooney, Bankrupt, 14 Blatchf., 204.
Tracey vs. *Sackett*, 1 Ohio St., 57.
Buckley vs. *Gilmore*, 12 Ohio R., 75.
Baker vs. *Smith*, 1 Holmes, 85.
Voorhees vs. *Melick*, 205 N. J. Eq., 523.

When it is remembered that in addition to the probative force of the sworn answer, and the weight which this Court, on an appeal, always gives to the careful and deliberate judgment of the Court below, there is in all cases where actual fraud is charged, a presumption of innocence, which the party alleging the fraud is bound to overcome, the cumulative force of these three considerations is so great that no circumstances of mere doubt or

suspicion, no matter how artfully arrayed by ingenious counsel, will serve to induce a reversal, unless the proof is so clear and convincing as to leave no room for doubt.

Without repeating the analysis of the evidence contained in the opinion of the Court, I will refer to a few additional circumstances which strengthen the conclusion reached by the Judges of the Circuit Court.

It is proved by Mr. Chamberlain, the cashier of the bank, that when the statement of September 12, 1873, was made, and published in October, 1873, he was of the opinion that the bank was solvent. (Record, p. 10.) In reply to a question put to him as to his own knowledge of the condition of the bank, he testifies as follows:

"*Q. 2.* At the time referred to, was or was not the First National Bank able to pay its liabilities?

"*A.* I considered at the time that it was; I mean its indebtedness—not its stockholders.

"*Q. 3.* What indebtedness at that time do you refer to?

"*A.* Amount due depositors.

"*Q. 4.* Did the bank at that time have on hand sufficient available assets to pay its then indebtedness?

"*A.* I considered at that time that if we had sufficient time to collect the assets that we had on hand, we could eventually pay the depositors."

So, on page 19, he says further that he then thought there was enough good paper held by the bank to pay its liabilities, and it was only in the light of subsequent developments that he was able, when he testified, to express an opinion that the bank, although it appeared to be solvent, was actually insolvent, in November and December, 1873.

Mr. Lamb, the president, testifies that when defendant Johnson was at Norfolk, in November, 1873, he was of opinion that a loan of $25,000 would relieve the bank of its difficulties.

He also says, on page 15:

"As our business had been very good before the panic I hoped some capitalist would take the stock and rescusitate the bank, *which could easily have been done with a very small amount of cash.*"

So, too, on page 16, he swears that he hoped up to the very day before the closing of the bank that its business would be rescusitated, and the solvency of the bank secured.

He knew, *what was unknown to others*, that because of his own liabilities to the bank, which much exceeded the legal limit, the preservation of the bank depended on the maintenance of his own credit, or on outside assistance.

So late as February 14, 1874, Lamb writes to Johnson, (p. 33): "With $4,000 cash, I could have infused new life into our stock and built it right up."

We have also the fact that the last public statement of the bank's affairs, which had been made previous to Johnson's visit to Norfolk, and was dated September 12, 1873, and was sworn to October 15, 1873, (record, p. 34,) stated that the assets of the bank, all told, were

		$566,891 82
Deduct the items, current expenses,	$1,729 27	
Taxes paid,	1,182 12	
		2,911 39
Balance available for debts,		$563,980 43

So, on the other side, the liabilities were in the aggregate, $566,891 82

Deduct due stockholders,	$100,000 00	
Surplus fund,	5,500 00	
Profit and loss,	350 67	
		105,850 67
Liabilities to others than stockholders,		$461,041 15
Assets as above,		563,980 43
Excess of assets over liabilities,		$102,939 28

Now, if we adopt the statement of the book-keeper, Hunter, as to those assets, that of the discounted paper $50,000 was bad, (record, p. 22,) and that the real estate was over-valued $12,000, (p. 23,) and deduct that $62,000 from the above surplus, it would still leave a clear balance of nearly $41,000 over all the liabilities of the bank.

Is it at all probable that in such a condition of the bank's affairs, with Mr. Lamb believing in good faith that a small loan of money would relieve the bank of embarrassments, he, when negotiating for such loan, would have disclosed to Johnson a state of facts which, if known to him, would defeat the loan? Because if the bank was then insolvent, or in danger of insolvency, and Johnson knew it, he would never have invested $25,000 more in it. Lamb had every inducement then to represent the affairs of the bank as favorably as possible.

Moreover, a disclosure of the real state of affairs, as then known to Lamb, would have shown that the danger to the bank, if any, was in the fact that the bank held $50,000 of Lamb's paper, equal to half its capital. (Record, p. 16.)

This was a flagrant violation of the National Bank Act, *Rev. Statutes*, § 5200, which forbids a credit to any person of over one-tenth part of the capital stock.

And section 5442, which forbids and makes void all transfers by the bank, after the commission of an act of insolvency, or in contemplation thereof, would afford reason enough to Lamb for concealing from Johnson the insolvent condition of the bank if he, Lamb, then knew or suspected it.

There is, therefore, no proof that the bank was insolvent in November when Johnson was there, nor does the bill fix the date of the bank's insolvency earlier than the month of January, 1874. (Record, p. 3.)

If it was true that as early as November the bank's affairs were in such a condition that its bankruptcy was

imminent, such fact could easily have been proved in this case. The production and proof of the statements made to the comptroller, which declared the amount of suspended paper held by the bank, would have shown such insolvency if it had existed. And it is not to be presumed that the able and vigilant Comptroller of the Currency would have allowed the bank to go on for six months, with evidence of its insolvency on the files in his office.

If, then, as it is fair to presume from the evidence, that in November, 1873, neither the president nor the cashier of the bank, nor the Comptroller of the Currency knew that the bank was insolvent, with what show of plausibility can it be argued that Johnson knew it, or had any reason to suspect it? He avers in his answer that on the 15th of April, 1874, he received a statement of the assets and liabilities of the bank, which reported the bank as entirely solvent, and able to pay all its liabilities, and that he had no reason to doubt, and did not doubt, that such statement was entirely correct, and we insist that all the circumstances corroborate his statement.

Mr. Lamb repeatedly speaks of his own credit and that of the bank as affected by the panic which occurred in the fall of 1873.

This recalls to our minds what is common intelligence, that after that panic there was such a general collapse of credit and a shrinkage of values, that hundreds of persons and institutions that were justly considered, and considered themselves perfectly solvent on the first of January, 1874, became hopelessly bankrupt before May, 1874, and the fact that the bank failed on the 26th of May, is perfectly consistent with its entire solvency in November, 1873.

I think it is very clear, therefore, that without regard to the evidence of Mrs. Valentine, who was called for appellant and made his witness, there is an entire failure to establish the allegations on which the equity of appellant's bill must rest.

In regard to Mrs. Valentine's evidence the Court below said:

"She was placed on the stand by the complainant. He was not compelled to make her his witness, but having voluntarily done so he must accept her evidence as true, unless she has been contradicted by others. The law does not permit litigants to experiment with interested parties; allowing them to call their adversaries to testify, &c., and then to take such portions of their testimony as happens to be in their favor, and to reject such as seems to bear against them."

This rule stated by the Judge is a familiar one, and well supported by authority.

1 Greenleaf's Ev., § 442, and cases in note.
2 Best on Ev., § 645.
Holbrook vs. *Mix*, 1 E. D. Smith, 154.
Sanchez vs. *The People*, 22 N. Y., 152.
Stockton vs. *Demuth*, 7 Watts, 39.
Smith vs. *Price*, 8 Watts, 447.
Brown vs. *Bulkley*, 14 N. J. Eq., (1 McCarter,) 294.

The statute of New Jersey concerning evidence, (N. J. Revision of 1877, p. 278, § 2,) declares that

"When any party is called as a witness by the opposite party, he shall be subject to the same rules, as to examination and cross-examination, as other witnesses."

And section 858 of the Revised Statutes of the United States declares that the laws of the State in which the Court is held, shall be the rules of decision as to the competency of witnesses in the Courts of the United States.

Mrs. Valentine's evidence, although she was, in direc violation of the New Jersey statute, rigidly cross examined by the appellant, so far from overcoming the answer, supports it by proof that the sale of the stock to her was not colorable, but actual, *bona fide*, and fo a valuable consideration, and is, as the Court below sug gested, entirely contradicted.

There can be no force in the suggestion of appellant' brief, that because Johnson selected Lamb as his attorne

in fact, to transfer the stock to Mrs. Valentine, and because Lamb knew the condition of the bank when he made the transfer, that such knowledge is imputable to Johnson.

The case of *Johnston* vs. *Laflin*, 103 U. S., page 800, gives no support to any such doctrine. On the contrary, that case clearly distinguishes between the knowledge of an agent selected to negotiate the sale of the stock, and that of the mere instrument who may execute the transfer on the books, and the case holds that the rights of the parties are fixed by the execution and delivery of the deed of transfer, and that as between the parties the title of the vendee is complete, without the transfer on the books. If that were not so, the buyer of stock who has paid for it and received the certificate with a power to transfer, could have his title impaired by knowledge acquired by the vendor after the sale, and before the transfer was actually accomplished on the books. Such a notion is entirely repudiated by the case last cited.

Again, this is not a case for the application of the doctrine of *constructive notice*, which is defined to be "knowledge imputed on presumption too strong to be rebutted, that the knowledge must have been communicated."

Where a question of actual fraud is concerned, involving evil motive or intention, founded on prior knowledge which is supposed to induce such motive or intention, it is obvious that constructive notice which excludes the idea of actual knowledge, can have no effect in forming such motive or intention. It is difficult to perceive how any knowledge possessed by Lamb when he made the transfer on January 15th, could be held to relate back so as to influence the minds of the parties to this contract, which was consummated, so far as they were concerned, on the fifth of the previous December.

Another circumstance, related in the testimony of Mr. Lamb, sheds much light on the question of Johnson's knowledge.

He testifies, on page 13, that he received the transfer of stock from Johnson early in December, in a letter

which also announced Johnson's inability to make the loan of $25,000, which had been solicited of him. That letter contained the first instruction concerning the transfer to Mrs. Valentine. He did not make the transfer until January 15th. He gives as the reason for this delay, that the failure to obtain the loan and the continued stringency of the bank, caused him so much anxiety that he thought it would be necessary to make an immediate assessment upon the stockholders of fifty per cent. He therefore felt unwilling to transfer the stock until he was satisfied of the solvency of the party to whom it was to be transferred. He therefore wrote to Mr. Cole, and awaited his reply before making the transfer. The correspondence is on page 33.

Lamb says he was not satisfied of the solvency of Mrs. Valentine, *but after obtaining legal advice, he found that he had no right to refuse the transfer*, and therefore he transferred it on the 15th of January.

It is incredible that he would have received such advice, had he then disclosed to the counsel that he, himself, had made Johnson aware of the insolvent condition of the bank before the transfer was made. No counsel could have advised him, under such circumstances, that he had no right to refuse the transfer. Nor would he have withheld that most important fact from his counsel, had it been a fact, as the appellant now contends.

Moreover, Mr. Lamb after executing the transfer retains it for a month, and then incloses it in a letter to Johnson, dated February 14th, 1874, in which he directs the delivery of the stock to Mrs. Valentine, stating that $4,000 cash would have relieved the bank of its embarrassment, and does not suggest the least doubt as to the fairness or good faith of the transaction between Johnson and Mrs. Valentine.

I may here notice an erroneous assumption in the appellant's brief, on page 12: "That the insolvency of the bank at the time the shares were transferred is admitted (by not being denied) by the answer."

The proof shows that the shares were transferred on December 5th, 1873. There is no allegation in the bill that the bank was insolvent at that time, nor is there any direct and positive allegation of such insolvency at any time before the failure of the bank.

All that the bill alleges on that subject is on page 3 of the record, which is that "In the month of January, 1874, the defendant, Johnson, visited Norfolk for the purpose of inquiring and examining into the affairs of the said association; that the said Johnson became satisfied from the inquiries and examinations made by him, and from other information in relation to said bank, that the affairs of said association were in a critical condition, (as in fact they were,) and that a suspension of the bank was inevitable."

The above is the only allegation of the bill on the subject of the bank's insolvency, before its actual failure, and all it amounts to is a statement of Johnson's opinion or state of knowledge as to the affairs of the bank, the only actual assertion on the subject being stated parenthetically by the expression "as in fact they were,"—and that only goes to the critical condition of the bank, and not to its actual insolvency.

This, according to well settled rules of equity pleading, is not a sufficient statement of the fact of insolvency, so as to require an answer or to admit of proof.

In *Story's Equity Pleading*, § 28, the rule is thus laid down: "It may be proper, however, to remark that every material fact to which plaintiff means to offer evidence ought to be distinctly stated in the premises, for otherwise he will not be permitted to offer or require any evidence of such fact."

So in § 255, it is said, "In the next place it is a general rule that whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively and with precision."

The only allegations made are met and denied by the answer, and that is all the defendants were required to

do. They were not bound to deny what was not alleged. See also on this point—

Wood vs. *Dummer*, 3 Mason, 314.

II.

THIS CASE IS NOT ONE OF EQUITABLE COGNIZANCE, BUT IS ONE IN WHICH IF COMPLAINANT CAN RECOVER AT ALL, HE HAS A "PLAIN, ADEQUATE AND COMPLETE" REMEDY AT LAW.

This point was strongly pressed before the Court below, although they were so clear that the complainant had failed in the merits, that they did not allude to it in the opinion delivered. It was founded on the express prohibition of the act of Congress, *Rev. Stat.*, § 723, from which the language quoted in Point II. is taken.

In *Kennedy* vs. *Gibson*, 8 Wall., 505, which was one of the earliest cases on the liability of stockholders under this statute in this Court, it was said, "The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one; *when the whole amount is sought to be recovered, the proceeding must be at law.* When less is required the proceedings may be in equity," &c. In the present case the order of the Comptroller was to collect the whole. (Record, p. 32.)

The same rule is restated by this Court in *Casey* vs. *Galli*, 94 U. S., p. 677, where it is again said, "That when the order is to collect the full amount of the par of the stock the suit must be at law."

These cases make no distinction in cases of alleged fraud.

The true test which determines the jurisdiction of this Court, as between equity and law, is laid down in many cases.

In *Case* vs. *Beauregard*, 101 U. S., 690, Mr. Justice STRONG says: "The rule is a familiar one that a Court of equity will not entertain a case for relief, when the complainant has an adequate legal remedy. The com-

plaining party must, therefore, show that he had done all that he could do at law to obtain his rights."

So in *Thompson* vs. *Railroad Company*, 6 Wallace, 137, Mr. Justice DAVIS says: "The absence of a plain and adequate remedy at law is the only test of equity jurisdiction, and it is manifest that a resort to a Court of Chancery was not necessary in order to enable the Railroad Commissioners to collect their debt."

He also uses this language: "Has a Court of equity jurisdiction over such a case as is presented by this record? If it has not, the decree of the Court below must be reversed, the bill dismissed, and the parties remanded to the Court below to litigate their controversy in a Court of law. Usually when a case is not cognizable in a Court of equity the objection is interposed in the first instance, but if a plain defect of jurisdiction appear at the hearing, or on appeal, a Court of equity will not make a decree."

The same rule is laid down by the same Justice in *Watson* vs. *Sutherland*, 5 Wall., 78.

In *Wright* vs. *Ellison*, 1 Wall., 22, Mr. Justice SWAYNE speaking for this Court, says:

"We regard the case as a proper one for compensation, and in an action at law the complainant could hardly fail to recover. But this is a suit in equity. The rules of equity are as fixed as those of law, and this Court can no more depart from the former than from the latter. Unless the complainant has shown a right to relief in equity, however clear his rights at law, he can have no redress in this proceeding. *In such cases the adverse party has a constitutional right to a trial by jury.* The objection is one which though not raised by the pleadings, nor suggested by counsel, this Court is bound to recognize and enforce."

To the same effect are—

Parker vs. *Winnipisiogee Lake Cotton and Woolen Company*, 2 Black, 550, 551.

Hipp et al. vs. *Babin et al.*, 19 How, 277–8.

Apply these doctrines to the case in hand. The only pretence of necessity to resort to equity in this case si found in the allegation of the bill, on page 4 of the record, as follows :

"The said pretended transfer of the said 130 shares of the said capital stock being evidenced by formal assignment on the books of the association, your orator is advised to invoke the aid of a Court of equity to set aside said pretended transfer, and to enforce the personal liability of the said Johnson as the owner of the said 130 shares of stock."

Such a resort to equity is totally unnecessary to enable complainant to recover, because if his facts were capable of proof, the fraudulent transfer being totally void as against him, would offer no obstacle to a recovery at law. It needs no action of a Court of equity to set it aside. Proof of its fraudulent character avoids it, *in toto*, in any Court.

The case of *Davis* vs. *Stevens*, 17 Blatch., 259, is authority for the position that a receiver may recover at law against a defendant as stockholder, although the stock never stood in his name on the books of the bank, on the ground that if the putting the stock in the name of the third person was colorable, the transaction was void as against creditors, and the real owner was held liable.

In that case the relief was allowed at law although the defendant had never been the nominal owner of the stock.

If a resort to equity was not necessary in that case, certainly none was needed here to set aside the fraudulent transfer, for it was, if fraudulent, already void. *National Bank* vs. *Case*, 99 U. S., 628.

The statute of New Jersey, *Revision of N. J.*, p. 446, §§ 11 and 12, makes all such fraudulent conveyances "utterly void and of no effect," as against a creditor sought to be hindered thereby. It is plain, therefore, that if this transfer was made, as complainant alleges, for the very purpose of defeating the creditors of the

bank, it would not be allowed to stand a moment in the way of complainant had he pursued his remedy at law.

It being a case of alleged fraud, it is one in which a party's constitutional right to a trial by jury should not be lightly taken from him.

It is an error to invoke the doctrine of trusts, as referred to in appellant's brief, as a ground of equity jurisdiction. This bill is not for the enforcement of a trust, nor is it a proceeding to reach trust funds, which have been unlawfully diverted from their proper destination.

It is doubtless true, as appellant's brief contends, that the stock of a corporation constitutes a trust fund in favor of its creditors. So if the assets of a corporation represented by its stock are distributed among the shareholders, they take such assets charged with a trust in favor of creditors, which may be enforced in equity. So, too, shareholders who have subscribed to the stock of a corporation, but who have not paid it in full, may, in favor of creditors, be required to pay up their stock to the full amount of their subscriptions. These are familiar doctrines, but they have no application to this case. It was distinctly held in the case of *Johnston* vs. *Laflin*, (cited *supra*,) that the foregoing doctrines as to trusts are not applicable to a case of this character. The vendor of the stock of a National Bank, as of any other corporation, when he sells his stock and receives his money for it, receives no part of the assets of the corporation. If the sale is honest, the buyer stands in the place of the seller, and the seller is discharged from all liability. He holds the proceeds of such a sale entirely clear of any charge or claim in favor of the creditors of the corporation. In making such a *bona fide* sale and converting its proceeds to his own use, he exercises a legal right. In the absence of fraud, the creditors must look to his successor in the ownership of the stock, or to the person who is the real owner when bankruptcy intervenes. On the other hand a fraudulent sale is no sale. As to creditors, the vendor in such a case remains the owner, with

all the liabilities of the owner. A pretended transfer is simply void. It in no way interferes with the creditor, who in a Court of law, as has been shown, may brush it aside as a mere nonentity, and he needs no aid of a Court of equity to remove it. The proof of fraud, *ipso facto*, sets it aside.

So I insist that if appellant had been entitled to succeed below on the merits, he would have met this fatal obstacle to his recovery.

It was perhaps wise to decide the case on the merits, as a means of ending useless strife. If it had been necessary, the Court below would doubtless have dismissed the bill for the reasons now urged, and so should this Court.

III.

THE APPELLANT FAILED IN MAKING PROPER PROOF IN THE COURT BELOW, OF HIS AUTHORITY TO SUE FOR THIS CLAIM.

This point is founded on the necessity cast by law on the complainant to prove by proper and competent testimony that before he commenced his suit, the Comptroller of Currency has decided that it is necessary to enforce the personal liability of the stockholders of this bank, and a clear failure of complainant below to furnish any proper proof of such decision.

In *Kennedy* vs. *Gibson*, (cited *supra*,) this Court said, speaking of the necessity of such previous determination on the part of the complainant: "This action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of the suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved." In that case the Court sustained a demurrer to a bill for want of such an averment.

In the present case the matter is stated in the bill with, perhaps, sufficient certainty, (record, page 3.) And in the

answer the defendants deny all knowledge of it, except as is stated in the bill, and so complainant was put to the proof of his allegation. (Record, pages 6 and 7.)

The only proof made on the subject was the production of a paper said to be a letter from John Jay Knox, which was annexed to the deposition, and is found on page 32 of the record.

This letter, if properly proved or authenticated, contains no adjudication or determination, but merely recites a previous determination.

It is a mere declaration of Comptroller Knox that he had theretofore made such a determination.

This was not proper proof of such a matter; a certified copy of this determination should have been produced. No number of subsequent recitals of such fact by the Comptroller can supply the want of the regular formal proof of such an important jurisdictional fact.

But here was not even proof that the Comptroller ever signed this document; no witness testifies to it, nor is his hand-writing proved, nor is it authenticated by the seal of his office.

Section 884 of the Revised Statutes prescribes how documents from the Comptroller's office shall be authenticated. His action cannot be proved by mere declarations in a letter, especially where, as in this case, there is no proof that he wrote the letter.

For these reasons, as well as those stated in the opinion of the Circuit Court, it is respectfully insisted that the decree appealed from should be affirmed.

THOMAS N. McCARTER,

Counsel for Appellees.

17-257
OFFICE SUPREME COURT U.S.
FILED
JAN 24 1883
JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the United States.

October Term, 1882.

GEORGE E. BOWDEN, Receiver of the First National Bank of Norfolk, Va.,

vs.

JACOB C. JOHNSON and BETSEY VALENTINE.

No. 166.

Appeal from the Circuit Court of the United States for the District of New Jersey.

SUPPLEMENTAL BRIEF FOR APPELLANT.

I.

ON THE MOTION TO SUBSTITUTE THE NAME OF ADAMS, RECEIVER, FOR BOWDEN, RECEIVER.

1. The application for change of parties, where rights have changed by operation of law, as by new official appointments, is properly made by motion.

In Young *v.* United States, 97 U. S., 39, the assignee in

bankruptcy in England was made appellee in place of Collie, the original complainant in the court of claims.

In Loudon *v.* Taxing District, 104 U. S., 771, the taxing district of Shelby county was substituted in place of the city of Memphis, the General Assembly of Tennessee having repealed in 1879, the charter of the city.

2. The national banks are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end.

Farmers' and Mechanics' Nat'l Bank *v.* Dearing, 91 W. S., 29.

Receivers of national banks may be appointed under sections 5141, 5191, 5195, 5201, 5205, and 5234 of the Revised Statutes.

The receiver of a national bank represents the bank, its stockholders and its creditors; but not in any sense the National Government, so as to subject the United States to the jurisdiction of the courts. (Per Miller, Justice, in Case *v.* Terrell, 11 Wal., 199.)

But such a receiver, if appointed by the Comptroller of the Currency, is an officer of the United States.

In Platt *v.* Beach, 2 Ben., 303, (Thompson's National Bank Cases, 1, p. 182,) the district court assumed jurisdiction of a suit brought by a receiver under the provision of the act of Congress of 1815, sec. 4, March 3, which gives jurisdiction over "all suits at common law where the United States or any officer thereof, under the authority of any act of Congress, shall sue."

So in Stanton, Receiver, *v.* Wilkinson, 8 Ben., 357, (Brown's National Bank Cases, 162,) it was held that "a receiver of a national bank is in the public service of the United States. He is appointed pursuant to law. Vacation

of office by the comptroller does not vacate the receivership. His duties are continuous and permanent.

"The receiver is the agent of the United States."
Kennedy *v.* Gibson, 8 Wal., 498.

"The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. The receiver is the *statutory assignee* of the association, and is the proper party to institute all suits." (Ib.)

3. The proceeding on this motion should therefore be assimilated to the practice in cases of bankruptcy.

"An assignee in bankruptcy may, on motion, be substituted for bankrupt as plaintiff in error."
Herndon *v.* Howard, 9 Wal., 664.
Knox *v.* Exchange Bank, 12 Wal., 379.

4. This substitution is admissible under sections 1005 and 1012 of Revised Statutes. Those sections are as follows:

"SEC. 1005. The Supreme Court may, at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in *all other particulars of form;* provided, the defect has not prejudiced, and the amendment will not injure, the defendant in error.

"SEC. 1012. Appeals from the circuit courts and district courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations,

and restrictions as are or may be prescribed in law in cases of writs of error."

Hampton *v.* Rouse, 15 Wal., 684.
Atherton *v.* Fowler, 91 U. S., 143.
Moore *v.* Simonds, (an appeal,) 100 U. S., 145.
Gates *v.* Goodloe, 101 U. S. 612.
Phillips' Practice, 238.

II.

ON THE MOTION TO DISMISS.

To allow this motion would work great hardship and injustice, and delay for years the enforcement of a just remedy against these appellees in behalf of the many creditors of the bank. The allegation by the appellees' counsel that "the obtaining of the allowance of the appeal in the name of Bowden, receiver, was a fraud upon the court," is unsupported by a single fact.

The suit was instituted by Bowden, as receiver, on 13th December, 1876. All the proceedings were had under his direction, and the case was argued and submitted to the court in March, 1878, while Bowden was still the receiver. The court held the papers, and did not enter its final decree until Jan'y 16, 1879. In the interval, to wit, on June 1, 1879, Adams had been appointed receiver, but was surprised by the entry of the decree before he had asked to be substituted for Bowden. Acting under the advice of the Comptroller of the Currency, he determined that he was in duty bound to appeal, and instructed his counsel accordingly. Through inadvertence, caused perhaps by a misapplication of the language of this court in *ex parte* E. Cutting, 94 U. S., 14, the appeal was taken in the name of the original complainant. That there was no fraud attempted or intended

is clearly negatived by the fact that Adams gave bond for costs in his individual name, assuming a responsibility he might have avoided, and pledging his private means for the indemnification of the defendants against all loss by the appeal.

If Adams be now received as appellant, the case can be definitively disposed of by this court. The appellees can be in no way prejudiced or injured by the amendment. On the contrary, if the motion to substitute be allowed, their condition will be improved, because in that event a decree of affirmance by this court would preclude all further proceedings by Adams or the comptroller; whereas, if the appeal be dismissed, the decree below must be treated as a nullity, and the case reopened for a prolonged and expensive litigation.

III.

IS THERE A REMEDY IN EQUITY?

The question is not whether the complainant might have recovered at law, in case he could have established Johnson's fraud to the satisfaction of a jury, but whether he can under all the circumstances have resort to a court of equity. It is not denied that the rule is that there can be no recovery in equity, if there be a "plain, adequate, and complete" remedy at law; but it is denied that such a remedy exists at law.

There is nothing in Kennedy *v.* Gibson, 8 Wall., 505, or Casey *v.* Galli, 94 U. S., p. 677, or, indeed, in any of the cases cited, which deprives a party seeking to set aside a fraudulent assignment of his right to avail himself of the powers of a court of equity. The court intended only to lay down a general rule, and not to prescribe a procrustean standard, to which every case, however complicated and in-

volved, should be made to conform. It was not intended to change the rules by which equitable proceedings have been heretofore measured and determined. If a right to proceed in equity existed before Kennedy *v.* Gibson and Casey *v.* Galli were decided, it is respectfully submitted that such a right exists now unimpaired by the language of the court in those cases.

So it is contended that in all the earlier cases adduced by the appellee's counsel there is not a word or a principle announced that militates against the right to resort in this case to equitable remedies.

Take the cases up chronologically, and it will be found that this court has only refused to sustain proceedings in equity where there was a clear legal remedy.

In Hipp *v.* Babin, 19 How., 277–8, the decree dismissing the bill was affirmed because it was attempted to make a Bill in Equity perform the office of an action of ejectment.

In Parker *v.* Winnipiseogee Lake Cotton and Woollen Company, 2 Black, 550, 551, a decree dismissing a bill for a private nuisance was affirmed because the nature of the injury was not set out in such a manner as to show that the plaintiff was without a legal remedy.

In Wright *v.* Ellison, 1 Wal. 78, a decree dismissing the bill was affirmed because the complainant failed to show an equitable lien, and only established a right to recover upon a *quantum meruit.*

In Watson *v.* Sutherland, 5 Wal., 74, the court affirmed a decree of the circuit court granting a perpetual injunction against a sale of goods, which it was alleged had been fraudulently assigned, and declared the rule to be that "the absence of a plain and adequate remedy at law affords the only test of equity jurisdiction," but maintained that "the application of this principle to a particular case must depend

altogether upon the character of the case, as disclosed in the pleadings."

In Thompson *v.* Railroad Companies, 6 Wal., 134, a decree was reversed without prejudice and case remanded to enable the plaintiffs below to bring a civil action to enforce the collection of certain drafts in accordance with the provisions of the code of Ohio.

In Case *v.* Beauregard, 101 U. S., 690, the defendants below pleaded a decree in a former suit in equity in bar, and the court below, finding that the matter set up in the plea was sustained by the evidence, dismissed the bill. The decree was affirmed, thus maintaining the sufficiency of the first bill.

In National Bank *v.* Case, 99 U. S., 628, it was decided that a stockholder could not relieve himself from his liability as such stockholder by a colorable assignment; but that proceeding was in equity.

In Davis, Receiver, *v.* Stevens, 17 Blatch., C. Ct., 259, it was decided that a recovery might be had at law against a principal, as a stockholder of a bank, although he had purposely procured the shares to be entered in the name of his agent.

In none of these cases is it intimated that there can be no recovery in equity in a case like the present. On the contrary, all of them, taken collectively, go very far to establish the right to recover in that forum.

Bump on Fraudulent Conveyances, 530, *et seq.*, 3d edition, and the cases there cited, fully sustain the right to proceed in equity to set aside any fraudulent conveyance or transfer.

IV.

THE AUTHORITY AND DIRECTION OF THE COMPTROLLER OF THE CURRENCY TO INSTITUTE THIS PROCEEDING WAS DULY CONVEYED TO THE COMPLAINANT, AND WAS AMPLY PROVED.

See letter of instructions on page 67 of the record, as produced on page 45, without objection.

V.

RULE AS TO EFFECT OF ANSWER AS EVIDENCE.

It is not universally true that an answer which contains clear and positive denials of the allegations of the bill must prevail; unless it is overcome by the testimony of two witnesses to the substantial facts, or at least by one witness and other attendant circumstances which supply the want of another witness.

On the contrary, if there is sufficient evidence of any kind to outweigh the force of the answer, the plaintiff may have a decree in his favor. This sufficient evidence may consist of one witness, with additional and corroborative circumstances, to be found sometimes in the answer itself; or it may consist of circumstances alone, which, in the absence of a positive witness, may be sufficient to outweigh the answer even of a defendant who answers on his own knowledge.

Story's Eq. Juris., 1,528.
3 Greenleaf on Ev., 289.
Clark's Ex'tors *v.* Van Riemsdyk, 9 Cranch, 153.

JOHN A. J. CRESWELL,
Of Counsel for Appellant.

17-251

WARD & TICHENOR, Law Case Printers, 832 and 834 Broad St., Newark, N. J.

Supreme Court of the United States.

GEORGE E. BOWDEN, RECEIVER OF THE FIRST NATIONAL BANK OF NORFOLK, VA., *Appellant,*

and

JACOB C. JOHNSON AND BETSEY VALENTINE, *Appellees.*

No. 166.

On Appeal from the Circuit Court for the District of New Jersey.

The above named appellees by THOMAS N. McCARTER, their counsel, hereby submit to the Court their motion to dismiss the above appeal, and they state as the ground of such motion, that the appeal was irregularly and illegally taken by the said appellant, George E. Bowden, as receiver of the First National Bank of Norfolk, when at the time said appeal was taken and allowed, and for a long time prior thereto, said George E. Bowden had ceased to be receiver of said bank, and one Orson Adams had been duly appointed receiver of said bank, and for proof of the fact that the receivership of the said George E. Bowden had terminated before said appeal was taken, they refer to a certified copy of the order of the Acting Comptroller of the Currency, appointing a successor to said George E. Bowden as receiver, hereto annexed and marked Exhibit A. Also, to the affidavit of their counsel annexed thereto, and the petition referred to therein, marked Exhibit B.

THOMAS N. McCARTER,
Of Counsel for Appellees.

EXHIBIT A.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., June 1st, 1878.

Whereas, George E. Bowden was duly appointed and commissioned receiver of "The First National Bank of Norfolk," Virginia, on the 3d day of June, A.D., 1874,

Now, therefore, be it known that I, John S. Longworthy, Acting Comptroller of the Currency, do hereby appoint Orson Adams to be receiver of the said "The First National Bank of Norfolk," Virginia, in place of the said George E. Bowden, with all the powers, duties, and responsibilities given to, or imposed upon a receiver under the provisions of the Revised Statutes of the United States, which authorize the appointment of a Receiver.

In witness whereof, I have hereto subscribed my name, and have caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, the day and year first above written.

{L. S.}

(Signed,) J. S. LONGWORTHY,
Acting Comptroller of the Currency.

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, January 15th, 1883.

Pursuant to Section 884 of the Revised Statutes of the United States, I certify that I have carefully compared the attached paper with the original, and that the same is a true and complete copy of the original commission of Orson Adams, as receiver of "The First National Bank of Norfolk," Virginia, issued June 1st,

1878, now on file, and of record in this office, and of the whole of such original.

XXXXX
X Currency Bureau. X
X Seal of the X
X Comptroller X
X of the Currency X
X Treasury X
X Department. X
XXXXX

In testimony whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this fifteenth day of January, A.D., 1883.

JNO. JAY KNOX,
Comptroller of the Currency.

UNITED STATES SUPREME COURT.

GEORGE E. BOWDEN, RECEIVER OF THE FIRST NATIONAL BANK OF NORFOLK, VA.,
Appellant,
and
JACOB C. JOHNSON AND BETSEY VALENTINE,
Appellees.

No. 166.
On Appeal from the Circuit Court of the United States, for the District of New Jersey.

UNITED STATES OF AMERICA, DISTRICT OF NEW JERSEY, } *ss:*

THOMAS N. McCARTER, of full age, being duly sworn, on his oath says:

That he is solicitor and counsel for the above stated appellees, and has had the sole management and conduct of their defense to said cause from the commencement of said suit until now; and he says that he never knew or heard, or had any reason to suspect that George E. Bowden had been removed from his office as receiver of The First National Bank of Norfolk, until the sixth day of January, instant, when such fact was first communicated to him by the service on him of a copy of a

petition in the above stated cause, a copy of which petition is hereto annexed, marked Exhibit B.

And deponent further saith, that he has never seen either of said appellees since said appeal was taken; that he has corresponded with Jacob C. Johnson, one of them, at San Francisco, in the State of California, and so far as he knows, and as he verily believes, neither the said Jacob C. Johnson nor the said Betsey Valentine, has ever heard of the removal of said Bowden as receiver, and the appointment of said Orson Adams in his stead; that this deponent is informed and believes that said Jacob C. Johnson and Betsey Valentine now reside at San Francisco, in the State of California, and have resided there for several years.

Sworn and subscribed before me, this 17th day of January, A.D. 1883,

THOMAS N. McCARTER.

[L. S.] JOHN R. HARDIN, *Notary Public.*

COPY OF PETITION.

EXHIBIT B.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882.

GEORGE E. BOWDEN, RECEIVER OF THE FIRST NATIONAL BANK OF NORFOLK, VA., *vs.* JACOB C. JOHNSON AND BETSEY VALENTINE.	*No. 166.*

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Orson Adams, of Howard county, in the State of Maryland, and a citizen of the State of Maryland, at present receiver of the First National Bank of Norfolk, in the State of Virginia, respectfully represents:

First. That heretofore, to wit, on or about the third day of June, 1874, the above named George E. Bowden, of Norfolk, in the State of Virginia, was duly appointed receiver of the said "The First National Bank of Norfolk, Va.," with all the powers, duties and responsibilities given by, or imposed by law on such receiver, as fully appears by reference to the certificate duly authenticated by John Jay Knox, Comptroller of the Currency. (Record, p. 65.)

Second. That the said George E. Bowden, after duly qualifying as such receiver, did, on or about the 13th of December, 1876, acting under the special order and direction of the said Comptroller, proceed in the Circuit Court of the United States for the District of New Jersey,

by bill in equity, against the above named defendants, to enforce the statutory liability of said Jacob C. Johnson, as a stockholder of said bank, to the full amount of his stock, and to set aside a pretended transfer of said stock to the said Betsey Valentine, and for such other and further relief, general and special, as might be agreeable to equity and good conscience, which said bill in equity, after the filing of an answer and replication in due course, and after proof taken and other proceedings had, was on hearing dismissed with costs, by final decree, and thereupon an appeal from said decree was duly entered and allowed, and is now pending in this Honorable Court.

Third. That on the first day of June, 1878, your petitioner was by the acting Comptroller of the Currency, duly appointed receiver of the said "The First National Bank of Norfolk," in place of the said George E. Bowden, with all powers, duties and responsibilities given to, or imposed upon a receiver under the provisions of the Revised Statutes of the United States, which authorized the appointment of a receiver, as by a certificate of his said appointment duly authenticated, under the seal of said Comptroller, marked "Exhibit A," and filed herewith as part of this petition, will fully appear; and that your petitioner hath since duly accepted such receivership, and ever since hath been and now is the proper and rightful receiver of said bank.

Wherefore your petitioner, as the present and rightful receiver of said bank, prays that he may be substituted as the complainant and appellant in this cause, in the place and stead of the said George E. Bowden, without prejudice to the proceedings heretofore had therein, and that all proceedings to be hereafter had or taken therein in this Court, or under any decree or order thereof, or of the Circuit Court of the United States for the District of New Jersey, shall be had and taken in the name of your petitioner as such receiver, in place and stead of said Bowden; and that your petitioner may have such

other and further order or relief in the premises as may be right and proper.

And your petitioner will ever pray, &c.

ORSON ADAMS,
Receiver of the First National Bank of Norfolk, Va., by

(Signed,) JOHN A. J. CRESSWELL,
Of Counsel for Appellant, and for said Adams.

DISTRICT OF COLUMBIA, } *Sct.*
CITY OF WASHINGTON. }

On this fourth day of January, 1883, before me the subscriber, a Notary Public, in and for the District of Columbia, aforesaid, duly commissioned and qualified, personally appeared Orson Adams, the above named petitioner, and makes oath in due form of law, that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes the same to be true.

× × × × × × ×
× William Selby, ×
× Notary Public. ×
× District of ×
× Columbia. ×
× × × × × × ×

In witness whereof, I hereunto subscribe my name and affix my official seal, on the day and year first above named.

(Signed,) WILLIAM SELBY,
Notary Public.

17-266

Supreme Court of the United States.

October Term, 1881.

Ex parte J. B. WALL.

PETITION FOR MANDAMUS.

To the Honorable the Justices of the Supreme Court of the United States of America:

The petition of J. B. Wall, a citizen of the United States, respectfully showeth unto your honors:

That he is an attorney and counselor at law in good professional standing, and as such has been duly admitted to plead and practice in the Circuit and District Courts of the United States for the Southern District of Florida; that during the March Term of the said Circuit and District Courts for the present year, to wit, on the 7th day of March instant, James W. Locke, judge of the said District Court, exercising both Circuit and District Court jurisdiction, issued and served upon your petitioner a rule in the following words and figures, to wit:

Circuit Court of the U. S., So. District of Florida. March Term, 1882.

Whereas it has come to the knowledge of this court that one J. B. Wall, an attorney of this court, did, on the sixth day of this present month, engage in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, to take from the jail of Hillsborough county and hang by the neck until he was dead one John, other-

wise unknown, thereby showing such an utter disregard and contempt for the law and its provisions, which, as a sworn attorney, he was bound to respect and support, as shows him to be totally unfitted to occupy such position:

It is hereby ordered that said J. B. Wall be cited to appear and show cause by eleven o'clock Wednesday, the eighth instant, why his name should not be stricken from the roll of attorneys, and he be disbarred and prohibited from practicing herein.

(Signed) JAMES W. LOCKE,
District Judge.

TAMPA, FLORIDA, *March* 7, 1882.

[Endorsed:] *In re* J. B. Wall; order to show cause why name should not be stricken from roll, etc.; filed March 7th, 1882. E. O. Locke, clerk.

Circuit Court of the United States, Southern District of Florida. Regular Term, Wednesday, March 8th, 1882.

In re
JOS. B. WALL, Esq., Att'y.

Now comes Jos. B. Wall, Esq., and requests that the order to show cause served upon him and returnable this day be continued until after the session of Circuit Court of the Sixth Judicial Circuit of the State of Florida next held in Hillsborough county.

And decision upon the request for continuance is reserved.

Attest. (S'g'd) E. O. LOCKE, Clerk.

That on the 9th day of said month your petitioner filed the following answer to said rule, to wit:

In the District Court of the United States, Southern District of Florida.

THE UNITED STATES
vs.
J. B. WALL. } Rule to show cause, &c.

This respondent, now and at all times hereafter saving and reserving to himself all and all manner of benefits of exception to the many errors, uncertainties, and imperfections in the said rule contained, prays leave to object, as if he had demurred thereto, to the right, authority, or juris-

diction of this court to issue said rule and require him to answer it:

1st. Because said rule does not show that the matters therein charged took place in the presence of the court, or were brought to the knowledge of the court by petition or complaint in writing under oath; and,

2d. Because respondent is charged in said rule with a high crime against the laws of Florida not cognizable in this court, and for which, if proven, this respondent is liable to indictment and prosecution before the State court; but for answer to so much of said rule as this respondent is advised that it is material or proper for him to make answer to, answering, saith—

He denies counseling, advising, encouraging, or assisting an unlawful, tumultuous, and riotous gathering or mob in taking one John from the jail of Hillsborough county and causing his death by hanging in contempt and defiance of the law, or that he has been guilty of any unprofessional or immoral conduct which shows him to be unfitted for the position of an attorney and proctor of this court, as he is charged in the said rule.

Whereupon he prays to be hence dismissed, &c.

(Signed) J. B. WALL.

[Endorsed:] The United States *vs.* J. B. Wall; rule to show cause, &c.; answer of respondent; filed March 9th, 1882; E. O. Locke, clerk.

And thereupon the said judge entered the following order, to wit:

Circuit Court of the United States of the Southern District of Florida. Regular Term, Thursday, March 9th, 1882.

In re
JOSEPH B. WALL, Attorney.

Proceedings to Disbar.

Respondent withdraws his motion for continuance, and answers the order herein made:

And the court overrules the 1st article of said answer, being in the nature of a demurrer.

And respondent excepts thereto, which exception is noted.

And the court overrules so much of the 2d article of said answer as says that respondent is charged in said rule with a high crime against the State of Florida not cognizable in this court, and for which, if proved, this respondent is liable to indictment and prosecution before the State court.

And respondent excepts thereto, which exception is noted.

And the court calls to the stand to testify herein Peter A. Williams.

At request of respondent it is ordered that the testimony be reduced to writing.

And PETER A. WILLIAMS, being duly sworn, testifies:

U. S. Circuit Court, Southern District of Fla.

In re }
JOS. B. WALL. }

Peter A. Williams, being duly sworn to testify, says:

I saw Mr. J. B. Wall and others come to Mr. Craft's house about two o'clock, March 6th, and having already heard that a sheriff's posse had been summoned to protect the jail, I thought by the orderly manner they came in that it was the sheriff's posse coming for instructions. I was sitting on the end of the piazza, and did not go in the house, but sat there till they came out, thinking they had come for instructions.

When they came out I heard one of the party remark, "We have got all out of you we want." Mr. Wall was one of the party.

I then thought something was wrong; they all went out of the gate, and Mr. Craft after them, and I followed after them rather slowly, and when I got to the corner I saw the party coming out of the jail with the criminal, the man who was afterwards hanged. They carried him over the steps to the oak tree in front of the steps to the court-house. The crowd gathered around him, and some one threw the man down. I saw him then put on a dray, and afterwards pulled up on the tree. There was a crowd of about a hundred persons there. I don't think I could name any man in that crowd except the sheriff, who was there protesting, as I had come away from the crowd and was on the upper piazza of the court-house. I heard the man hollowing. He was put on a dray with a rope around his neck. The

dray went off and he fell to the ground about ten feet from a perpendicular; then the crowd pulled the rope and he went up. The crowd had their backs towards me. I suppose I could have identified some one if I had thought to, but I was excited, and did not notice who they were. I saw Mr. Wall coming from the jail with the prisoner until they crossed the fence; then I did not see him any more until after it was over. I did not see him leave the crowd, though he might have done it without my seeing it. When going from the jail to the tree Mr. Wall, I think, had hold of the prisoner; he was beside him.

I did not see him afterwards until the hanging was over, then the crowd had increased, perhaps, to 200 persons, and I went down to them to the plank-walk.

This was Monday of this week, the 6th of this month. I think in Tampa, Hillsboro' county.

I also saw Mr. Sparkman, the mayor of the city, protesting at the time of the hanging.

To cross-questions he says:

When the man fell from the dray he fell his full length to the ground; the rope was slack.

Given in open court this March 9th, 1882, and reduced to writing by me and read to deponent.

Attest. (Signed) E. O. Locke, Clerk.

[Endorsed:] Circuit Court U. S.; *In re* Jos. B. Wall. Testimony of Peter A. Williams; filed March 9th, 1882. E. O. Locke, clerk.

That on the 10th day of the same month the said judge rendered his final order and judgment in the premises in the following words and figures, to wit:

Circuit Court of the United States of the Southern District of Florida. Regular Term, Friday, March 10th, 1882.

In re
Jos. B. Wall, Att'y, &c.

The argument of this question is argued for respondent by S. M. Sparkman, Esq., att'y.

Upon consideration thereof, it is ordered: That J. B.

Wall be prohibited from practicing at the bar of this court until a further order herein."

That on the 11th day of said month your petitioner spread upon the motion docket of said court and presented to the judge the following motion to vacate said final order, to wit:

"Circuit Court of the United States, Southern District of Florida. Regular Term, Saturday, March 11th, 1882.

In re
Jos. B. WALL, Att'y, &c.

Now comes respondent by his attorney, S. M. Sparkman, Esq., and moves that the order herein rendered be vacated.

District Court of the United States, Southern District of Florida. *Motion Docket. March Term*, 1882.

THE UNITED STATES
vs.
J. B. WALL. } Rule to show cause, &c.

Now, on this 11th day of March, A. D. 1882, comes the respondent by his counsel and moves the court to vacate and set aside the final order and judgment made and entered herein on the 10th day of March instant, for the following reasons:

1st. Because the court erred in issuing a rule against the respondent before a complaint in writing and under oath had been exhibited against him.

2d. Because the court erred in issuing such rule against the respondent on insufficient grounds.

3d. Because the court erred in issuing such rule and requiring the respondent to answer the same, the said rule charging the respondent with an offense against the laws of the State which might subject him to a criminal prosecution in the State court.

4th. Because the court erred in overruling the demurrer of respondent to said rule.

5th. Because the court erred in rendering such final order and judgment indefinitely suspending the respondent from practicing in the court.

6th. Because the testimony taken by the court was wholly

insufficient to sustain the allegations of the rule and to warrant the final order and judgment of the court.

7th. Because the allegations of said rule, if proven, were insufficient to warrant the final order and judgment of the court herein.

8th. Because the court erred in rendering such final order and judgment upon the record.

(Signed) J. B. WALL,
By S. M. & G. B. SPARKMAN,
Attorneys for Respondent.

And the motion is argued and submitted, and the court reserves its decision."

And that on the 20th day of said month the said judge filed the following order denying said motion, to wit:

Circuit Court of the United States, Southern District of Florida. Regular Term, Monday, March 20th, 1882.

In re }
Jos. B. WALL. }

Motion to vacate judgment herein is denied.

Circuit Court of the United States, Southern District of Florida. March Term, 1882.

In the Matter of } Rule to show cause, &c.
J. B. WALL. }

On motion to vacate judgment.

This motion having been fully heard by argument, and each and every ground therein urged having been fully and carefully considered, and the court being duly advised in the premises, it is hereby ordered that said motion be denied, and the final judgment herein stand as entered.

(Signed) JAMES W. LOCKE, Dis. Judge.

TAMPA, FLA., *March 20th*, 1882.

[Endorsed:] *In re* Jos. B. Wall; rule to show cause, &c.; order refusing motion to vacate judgment; filed 20th March, 1882.

All of which will appear by reference to the records of

said court, a certified transcript of which is hereto attached and prayed to be taken as a part of this petition.

Your petitioner avers that the action of the said judge in the premises, and his final order and judgment disbarring your petitioner until the further order of the court, were irregular, illegal, unjust, and oppressive. Whereupon your petitioner prays your honors for an alternative writ of mandamus to be directed to the said James W. Locke, judge of the Southern District of Florida as aforesaid, citing and commanding him upon a day therein specified to appear before your honorable court to show cause, if any he can, why a peremptory writ should not issue against him to compel him to vacate and set aside his aforesaid final order and judgment herein and restore your petitioner to all the rights, privileges, and immunities of an attorney and proctor of said court, of which he has been most wrongfully deprived.

And your petitioner will ever pray, &c.

J. B. WALL, Petitioner.

C. W. JONES,
For Petitioner.

Circuit Court of the U. S., So. District of Florida. March Term, 1882.

Whereas it has come to the knowledge of this court that one J. B. Wall, an attorney of this court, did, on the sixth day of this present month, engage in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, take from the jail of Hillsborough county and hang by the neck until he was dead one John, otherwise unknown, thereby showing such an utter disregard and contempt for the law and its provisions, which, as a sworn attorney, he was bound to respect and support, as shows him to be totally unfitted to occupy such position:

It is hereby ordered that said J. B. Wall be cited to appear and show cause by eleven o'clock Wednesday, the eighth instant, why his name should not be stricken from the roll of attorneys, and he be disbarred and prohibited from practicing herein.

(Signed) JAMES W. LOCKE,
District Judge.

TAMPA, FLORIDA, *March* 7, 1882.

[Endorsed:] *In re* J. B. Wall; order to show cause why name should not be stricken from roll, etc.; filed March 7th, 1882. E. O. Locke, clerk.

Circuit Court of the United States, Southern District of Florida. Regular Term, Wednesday, March 8th, 1882.

In re
Jos. B. WALL, Esq., Att'y.

Now comes Jos. B. Wall, Esq., and requests that the order to show cause served upon him and returnable this day be continued until after the session of the Circuit Court of the Sixth Judicial Circuit of the State of Florida next held in Hillsborough county.

And decision upon the request for continuance is reserved.

Attest. (S'g'd) E. O. LOCKE, Clerk.

In the District Court of the United States, Southern District of Florida.

THE UNITED STATES *vs.* J. B. WALL. } Rule to show cause, &c.

This respondent, now and at all times hereafter saving and reserving to himself all and all manner of benefits of exception to the many errors, uncertainties, and imperfections in the said rule contained, prays leave to object, as if he had demurred thereto, to the right, authority, or jurisdiction of this court to issue said rule and require him to answer it:

1st. Because said rule does not show that the matters therein charged took place in the presence of the court, or were brought to the knowledge of the court by petition or complaint in writing under oath; and,

2d. Because respondent is charged in said rule with a high crime against the laws of Florida not cognizable in this court, and for which, if proven, this respondent is liable to indictment and prosecution before the State court; but for answer to so much of said rule as this respondent is advised that it is material or proper for him to make answer to, answering, saith—

He denies counseling, advising, encouraging, or assisting an unlawful, tumultuous, and riotous gathering or mob in taking one John from the jail of Hillsborough county and causing his death by hanging in contempt and defiance of the law, or that he has been guilty of any unprofessional or immoral conduct which shows him to be unfitted for the position of an attorney and proctor of this court, as he is charged in the said rule.

Whereupon he prays to be hence dismissed, &c.

(Signed) J. B. WALL.

[Endorsed:] The United States *vs.* J. B. Wall; rule to show cause, &c.; answer of respondent; filed March 9th, 1882; E. O. Locke, clerk.

Circuit Court of the United States of the Southern District of Florida. Regular Term, Thursday, March 9th, 1882.

In re
JOSEPH B. WALL, Attorney.

Proceedings to Disbar.

Respondent withdraws his motion for continuance, and answers the order herein made:

And the court overrules the 1st article of said answer, being in the nature of a demurrer.

And respondent excepts thereto, which exception is noted.

And the court overrules so much of the 2d article of said answer as says that respondent is charged in said rule with a high crime against the State of Florida not cognizable in this court, and for which, if proved, this respondent is liable to indictment and prosecution before the State court.

And respondent excepts thereto, which exception is noted.

And the court calls to the stand to testify herein Peter A. Williams.

At request of respondent it is ordered that the testimony be reduced to writing.

And PETER A. WILLIAMS, being duly sworn, testifies:

U. S. Circuit Court, Southern District of Fla.

In re
Jos. B. WALL.

Peter A. Williams, being duly sworn to testify, says:

I saw Mr. J. B. Wall and others come to Mr. Craft's house about two o'clock, March 6th, and having already heard that a sheriff's posse had been summoned to protect the jail, I thought by the orderly manner they came in that it was the sheriff's posse coming for instructions. I was sitting on the end of the piazza, and did not go in the house, but sat there till they came out, thinking they had come for instructions.

When they came out I heard one of the party remark, "We have got all out of you we want." Mr. Wall was one of the party.

I then thought something was wrong; they all went out of the gate, and Mr. Craft after them, and I followed after

them rather slowly, and when I got to the corner I saw the party coming out of the jail with the criminal, the man who was afterwards hanged. They carried him over the steps to the oak tree in front of the steps to the court-house. The crowd gathered around him, and some one threw the man down. I saw him then put on a dray, and afterwards pulled up on the tree. There was a crowd of about a hundred persons there. I don't think I could name any man in that crowd except the sheriff, who was there protesting, as I had come away from the crowd and was on the upper piazza of the court-house. I heard the man hollowing. He was put on a dray with a rope around his neck. The dray went off and he fell to the ground about ten feet from a perpendicular; then the crowd pulled the rope and he went up. The crowd had their backs towards me. I suppose I could have identified some one if I had thought to, but I was excited, and did not notice who they were. I saw Mr. Wall coming from the jail with the prisoner until they crossed the fence; then I did not see him any more until after it was over. I did not see him leave the crowd, though he might have done it without my seeing it. When going from the jail to the tree Mr. Wall, I think, had hold of the prisoner; he was beside him.

I did not see him afterwards until the hanging was over, then the crowd had increased, perhaps, to 200 persons, and I went down to them to the plank-walk.

This was Monday of this week, the 6th of this month. I think in Tampa, Hillsboro' county.

I also saw Mr. Sparkman, the mayor of the city, protesting at the time of the hanging.

To cross-questions he says:

When the man fell from the dray he fell his full length to the ground; the rope was slack.

Given in open court this March 9th, 1882, and reduced to writing by me and read to deponent.

Attest. (Signed) E. O. Locke, Clerk.

[Endorsed:] Circuit Court U. S.; *In re* Jos. B. Wall. Testimony of Peter A. Williams; filed March 9th, 1882. E. O. Locke, clerk.

Circuit Court of the United States of the Southern District of Florida. Regular Term, Friday, March 10th, 1882.

In re
Jos. B. WALL, Att'y, &c.

The argument of this question is argued for respondent by S. M. Sparkman, Esq., att'y.

Upon consideration thereof, it is ordered: That J. B. Wall be prohibited from practicing at the bar of this court until a further order herein.

Circuit Court of the United States, Southern District of Florida. Regular Term, Saturday, March 11th, 1882.

In re
Jos. B. WALL, Att'y, &c.

Now comes respondent by his attorney, S. M. Sparkman, Esq., and moves that the order herein rendered be vacated.

District Court of the United States, Southern District of Florida. *Motion Docket. March Term*, 1882.

THE UNITED STATES
vs.
J. B. WALL. } Rule to show cause, &c.

Now, on this 11th day of March, A. D. 1882, comes the respondent by his counsel and moves the court to vacate and set aside the final order and judgment made and entered herein on the 10th day of March instant, for the following reasons:

1st. Because the court erred in issuing a rule against the respondent before a complaint in writing and under oath had been exhibited against him.

2d. Because the court erred in issuing such rule against the respondent on insufficient grounds.

3d. Because the court erred in issuing such rule and requiring the respondent to answer the same, the said rule charging the respondent with an offense against the laws of the State which might subject him to a criminal prosecution in the State court.

4th. Because the court erred in overruling the demurrer of respondent to said rule.

5th. Because the court erred in rendering such final

order and judgment indefinitely suspending the respondent from practicing in the court.

6th. Because the testimony taken by the court was wholly insufficient to sustain the allegations of the rule and to warrant the final order and judgment of the court.

7th. Because the allegations of said rule, if proven, were insufficient to warrant the final order and judgment of the court herein.

8th. Because the court erred in rendering such final order and judgment upon the record.

(Signed) J. B. WALL,
By S. M. & G. B. SPARKMAN,
Attorneys for Respondent.

And the motion is argued and submitted, and the court reserves its decision.

Circuit Court of the United States, Southern District of Florida. Regular Term, Monday, March 20th, 1882.

In re }
Jos. B. WALL. }

Motion to vacate judgment herein is denied.

Circuit Court of the United States, Southern District of Florida. March Term, 1882.

In the Matter of }
J. B. WALL. } Rule to show cause, &c.

On motion to vacate judgment.

This motion having been fully heard by argument, and each and every ground therein urged having been fully and carefully considered, and the court being duly advised in the premises, it is hereby ordered that said motion be denied, and the judgment herein stand as entered.

(Signed) JAMES W. LOCKE, Dis. Judge.
TAMPA, FLA., *March 20th*, 1882.

[Endorsed:] *In re* Jos. B. Wall; rule to show cause, &c.; order refusing motion to vacate judgment; filed 20th March, 1882.

I, E. O. Locke, clerk of the Circuit Court of the United States for the Southern District of Florida, do hereby certify that the foregoing pages, numbered from one to fourteen inclusive, constitute a true copy of the proceedings and a correct transcript of the record of the judgment in the case of the United States, plaintiff, and Joseph B. Wall, defendant, as appears upon the files and records of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this the 27th day of March, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] E. O. LOCKE,
Clerk U. S. Circuit Court for Southern District of Florida,
By H. L CRANE, Deputy Clerk.

17-266

RETURN TO RULE.

No. 5.—ORIGINAL.

Supreme Court of the United States. October term, 1882.

IN THE MATTER OF J. B. WALL, ATTORNEY AT LAW. } Petition for writ of mandamus.

To the honorable Chief Justice and associate justices of the Supreme Court of the United States:

And now comes James W. Locke, district judge of the United States for the southern district of Florida and in answer to the order herein made, that he should show cause why an order prohibiting said J. B. Wall from practising as an attorney before the circuit and district courts of said district should not be revoked, and he restored to all the rights of an attorney therein, says:

That during a session of the circuit and district courts of the United States at Tampa, in said southern district of Florida, he, the said James W. Locke, presiding, on the sixth day of March, A. D. 1882, at the adjournment of said courts for dinner, at about one o'clock of said day, as he was passing from the court-house, a prisoner was being brought to the jail in the same yard by two officers; that upon his return to the court-house after dinner, in a little more than an hour, the dead body of the same prisoner, hung from the limb of a tree directly in front of the court-house door; whereby he became personally informed of the commission *fo* a most serious offence against the laws. That same afternoon he was informed of the active participation in said crime of one J. B. Wall, an attorney of said court, by an eye-witness in whom the most implicit confidence could be placed, but who declined to make any charge or affidavit of such fact on account of a fear of said Wall's influence and the local feeling it would cause against him, the said witness.

That not only from the direct statements of eye-witnesses but from numerous other sources reliable information of like import was received; whereupon said J. B. Wall, your petitioner, was, on the said seventh day of March, during a session of the circuit court of the United States, in open court, charged in writing by the respondent herein, as judge, with having, with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, taken from the jail of Hillsborough County, and hanged to a tree by the neck until he was dead, a man to the court known only as John; and cited by rule served upon him to show cause by eleven o'clock a. m. of the next day, the eighth day of said March, why his name should not be stricken from the roll of attorneys and he prohibited from practising in the U. S. courts of said district.

That at said time of return, said J. B. Wall appeared in person, and by

counsel and moved that whereas said rule had charged him with a criminal offence, indictable by the grand jury of the courts of the State, the matter be continued until after the meeting of such grand jury; and the matter was held under advisement by the court and continued until next day.

That at the opening of the court the next day, before any order had been made upon the pending motion, came said J. B. Wall, and withdrew said motion for continuance and filed answer demurring to the right of the court to issue the rule served upon him, because,

1st. It did not show that the matter charged took place in the presence of the court, or was brought to the court by a petition or complaint under oath;

2nd. The respondent was charged with a high crime against the laws of Florida, not cognizable in said circuit court, and for which, if proven, he would be liable to indictment and prosecution before the courts of that State; and in answer, denying that he counselled, advised, encouraged, or incited an unlawful, tumultuous, and riotous gathering or mob in taking one John from the jail of Hillsborough County, and causing his death by hanging, in contempt and defiance of the law, or that he had been guilty of any unprofessional or immoral conduct which showed him unfitted for the position of an attorney and proctor of said court; and demanded that proof be had of the matter charged.

That thereupon Peter A. Williams, esq., U. S. marshal for said district, being duly sworn, testified as follows, and said: "I saw J. B. Wall and others come to Mr. Craft's (the sheriff's) house about 2 o'clock p. m., March 6, and having heard that a sheriff's posse had been summoned to protect the jail, thought by the orderly manner in which they came that it was this posse coming for instructions. I was sitting on the end of the piazza and did not go into the house, but sat there until they came out, thinking they had come for instructions. When they came out I heard one of them remark, 'We've got all out of you we want.' Mr. Wall was one of the party. I then thought something was wrong. They all went out of the gate and Mr. Craft after them, and I followed after them rather slowly, and when I got to the corner I saw the party coming out of the jail with the prisoner, the man who was afterwards hanged. They carried him over the steps to the oak tree in front of the court-house. The crowd gathered around him and some one threw the man down. I saw him then put on a dray and afterwards pulled upon the tree. There was a crowd of about a hundred persons there then. I don't think I could name any man in that crowd except Mr. Craft, who was there protesting. As I had come away from the crowd and was on the upper piazza of the court-house, I heard the man hallooing. He was put on a dray with a rope 'round his neck; the dray went off and he fell to the ground, about ten feet from a perpendicular, then the crowd pulled the rope and he went up. The crowd had their backs toward me. I suppose I could have identified some one if I had thought to, but was excited and did not know who they were. I saw Mr. Wall coming from the jail with the prisoner until they crossed the fence, then I did not see him any more until it was all over. I did not see him leave the crowd, though he might have done so without my seeing it. When going from the jail to the tree I think Mr. Wall had hold of the prisoner; he was beside him. I did not see him afterward until the hanging was over, then the crowd had increased to perhaps 200 persons and I went down to them to the plank walk.

"This was Monday of this week, the sixth of this month, I think, in Tampa, Hillsborough Co.; I saw also Mr. Sparkman, the mayor of the city, protesting at the time of the hanging. When the man fell from the dray he fell his full length to the ground; the rope was slack."

Whereupon J. B. Wall being himself present and stating that he had no testimony to offer, and desiring to be heard by counsel, was so heard, and the court took the matter under consideration.

Afterwards, to wit, on the tenth day of March aforesaid, the matter having been fully and duly considered, it was ordered that J. B. Wall be prohibited from practicing at the bar of circuit or district courts of this district until further order therein.

All of which matters are true, and as far as relate to the action of the court therein shown and set forth in the records of said court and the papers therein.

And, further answering, he says that J. B. Wall at no time denied active participation in the hanging as charged, nor answered the spirit and substance of said charge.

That when the motion for continuance was withdrawn by him, and the demand made that proof be made of the charge, upon inquiry your respondent ascertain' that both the sheriff and mayor, who had alone opposed the action of the mob, and the only parties present not active participants, were absent from the city, and could not be summoned to testify without unadvisable delay; of all of which said J. B. Wall had knowledge.

That on account of the excited state of feeling existing at the time, the timidity of many, from the influential position of some of those engaged in the hanging, and the sympathy of others with the lynchers, it was not advisable to attempt to compel any resident of said city of Tampa who was found to have had personal knowledge of the matter, to testify against said J. B. Wall.

That said J. B. Wall had every opportunity to explain his presence and action in the matter as proven, if innocent, but made no attempt to do so.

That the evidence, although of but a single witness, for grounds already stated, was to your respondent positively conclusive beyond a reasonable doubt that said J. B. Wall had been guilty of active participation in a most immoral and criminal act, and a leader in a most atrocious murder, in defiance and contempt of all law and justice, and had thereby shown himself unfitted to longer retain the position of an attorney in any court over which your respondent might have the honor to preside.

Wherefore and upon which showing your respondent would most humbly submit to your honors that said order prohibiting said J. B. Wall from practicing as attorney should not be revoked nor he restored to the rights and privileges of an attorney of said courts.

JAMES W. LOCKE,
U. S. Dis. Judge, So. Dis. Fla.

KEY WEST, FLA., *Dec'r* 2, 1882.

(Indorsed:) Supreme Court U. S. 1882. October term. No. 5. Orig'l. Ex parte. In the matter of J. B. Wall, petitioner. Return of U. S. district judge to rule. Filed 14th, Dec'r, 1882.

OFFICE SUPREME COURT U.S.
FILED
DEC 11 1882
JAMES H. McKENNEY, Clerk.
19-266

Supreme Court of the United States.

OCTOBER TERM, 1882.

Ex parte J. B. WALL.

PETITION FOR MANDAMUS.

BRIEF FOR PETITIONER.

C. W. JONES,
for the Petitioner.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1882.

Ex parte J. B. WALL.

PETITION FOR MANDAMUS.

Brief for Petitioner.

STATEMENT.

The petition shows that at the March term, 1882, of the circuit court of the United States for the southern district of Florida, J. B. Wall, an attorney of that court, was cited to appear and show cause, on the 8th day of March, 1882, why his name should not be stricken from the roll of attorneys, and he be disbarred and prohibited from practicing in said court, for having "engaged in and with an unlawful, tumultuous, and riotous gathering, he advising and encouraging thereto, to take from the jail of Hillsborough county, and hang by the neck until he was dead, one John, otherwise unknown."

The respondent prayed leave to object, as if he had demurred thereto, to the right, authority, or jurisdiction of the court to issue said rule and require him to answer it:

1st. Because it did not show that the matters therein charged took place in the presence of the court, or were brought to the knowledge of the court by petition or complaint in writing under oath; and

2d. Because respondent was charged in said rule with a high crime against the laws of Florida not cognizable in said court, and for which, if proven, respondent was liable to indictment and prosecution before the State court.

But for answer to much of said rule as respondent was advised that it was material or proper for him to make answer to, answering, said:

He denied counseling, advising, encouraging, or assisting an unlawful, tumultuous, and riotous gathering or mob in taking said John from the jail and causing his death by hanging in contempt and defiance of the law, or that he had been guilty of any unprofessional or immoral conduct which showed him to be unfitted for the position of an attorney and proctor of said court, as he was charged in said rule.

The court, upon the hearing, overruled the 1st article of said answer, being in the nature of a demurrer, and the respondent excepted.

The court overruled so much of the 2d article of said answer as says that respondent is charged in said rule with a high crime against the State of Florida not cognizable in said court, and for which, if proved, the respondent is liable to indictment and prosecution before the State court, and the respondent excepted thereto. And the court called to the stand to testify one Peter A. Williams, who testified in substance that he saw Mr. Wall and others come to Mr. Craft's house about 2 o'clock, March 6th, and having heard that a sheriff's posse had been summoned to protect the jail, witness thought, by the orderly manner they came in, that it was the sheriff's posse coming for instructions. Witness was sitting on the end of the piazza, and did not go in the house, but sat there till they came out, thinking they had come for instructions. When they came out witness heard

one of the party remark, "We have got all out of you we want." Mr. Wall was one of the party.

The party came out of the gate, and Mr. Craft after them, and witness followed after them rather slowly, and when he got to the corner he saw the party coming out of the jail with the man who was afterwards hanged. Witness saw Mr. Wall coming from the jail with the prisoner; thinks he had hold of him; was beside him until after they crossed the fence; then he did not see them any more until it was all over. He did not see Mr. Wall leave the crowd, though he might have done it without witness seeing him.

On the 10th day of March, 1882, the judge rendered his decision and judgment, ordering that the petitioner, the respondent below, be prohibited from practising at said court until further order.

On the following day the petitioner filed a motion to vacate and set aside said order, assigning eight separate reasons or grounds for said motion; and on the 20th day of said month the court denied said motion, and thereupon the petitioner filed this application for mandamus.

POINTS.

Mr. Wall, the petitioner in this case, is a citizen of the State of Florida, and was, up to the time he was disbarred, an attorney and counsellor in good standing in the circuit and district courts of the United States in Florida. During the month of March last an unlawful body of men took from the county jail of Hillsborough county, Florida, a person by the name of John, whom they put to death for attempting to violate the person of a young female.

At the time of this occasion the circuit court of the United States was in session in Tampa, where the man was executed. The court having been informed that Mr. Wall was connected with the lynching, proceeded in a most summary way to disbar him from all his rights as an attorney and

counsellor of the court. It is proper to add that Mr. Wall, in response to the rule of the court, denied that he participated in or advised the execution of John. The petitioner now asks this Court to issue a writ of mandamus directing the court in Florida to restore him to his rights and privileges as an attorney and counsellor of said court.

There is but one question involved in this application; that is, has this Court jurisdiction to grant the relief prayed for? In England the jurisdiction of the Court of King's Bench by mandamus to restore an attorney to his office is of ancient origin.

In most of the States of the Union the powers of courts over attorneys and their status as officers of the court are regulated by statute. And when an attorney is removed from the bar in conformity with a statute, it is a judicial act, performed in the execution of judicial discretion. This was the principle decided in the case of *Ex parte* Lecombe, (19 How., 9.) The inferior court in that case had, beyond doubt, jurisdiction over the officer by virtue of the statute, and this Court refused to control the judicial discretion exercised in the removal of the officer.

But there is a class of cases—and this application falls within it—in which relief will be granted by mandamus where the court has manifestly exceeded its authority and acted outside of its jurisdiction, as if it has disbarred an attorney for a contempt committed in another court. (*Ex parte* Bradley, 7 Wall., 364. People *vs.* Justices of Delaware Common Pleas, 1 Johns. Cases, 181.) In this case the Court disbarred the officer because he mingled with an excited multitude of people who took vengeance upon a criminal, who had committed an outrageous crime against virtue and decency.

I will not go into the question of Mr. Wall's guilt or innocence with respect to the charges for which he was disbarred. He was never indicted or tried for the offense according to the law of the county. The circuit court of the

United States had no jurisdiction to try him, even for the purpose of disbarring him. Had he committed murder himself instead of having mingled with the lynching party, far away from the presence of the court, will any lawyer say that such an act would have given the court jurisdiction to disbar him of his rights as an attorney. This case, then, does not fall within the principle laid down in *Ex parte* Lecombe, but within the one applied in the case of *Ex parte* Bradley. But the courts have gone even farther than this. In the well-considered case of *Ex parte* Kirk, (12 Fla., 278,) the court held that where an inferior court decides erroneously upon the testimony in disbarring an attorney, and a plain case of hardship is made to appear, a mandamus will lie to restore the officer.

An attorney may be struck off the roll—

1. For breach of the rules of the court.

2. For breach of any of his official duties.

3. For all such crimes and misdemeanors as affect his moral character.

But, in this third class of cases, courts cannot proceed in the ordinary way. There ought always to be a previous conviction before the courts can interfere. (2 Halsted's Report, N. J. Law, 199.)

In the case last cited, the attorney was charged with larceny. Kirkpatrick, Chief Justice, in speaking for the court, says: "The offense of which it is alleged this man has been guilty is neither a contempt of court, nor does it fall within the denomination of malpractice. It would appear to me, therefore, that he must be first convicted of the crime by a jury of his country before we can proceed against him for such an offense; for suppose he should be brought to the bar, and should say that he was not guilty, *we could not try the fact.*"

Mr. J. W. Scott, who made the application in behalf of the members of the bar, admitted in that case that "the general rule was, that if the attorney denies the charges made against him, they will dismiss the complaint."

If the circuit court, which disbarred the petitioner, was without jurisdiction in the matter, then the writ of mandamus is the appropriate remedy. This question was settled by this court in *Ex parte* Bradley. In that case Mr. Justice Nelson, speaking for the court, says: "This writ is applicable only in the supervision of the proceedings of inferior courts, in cases where there is a legal right without any existing legal remedy. It is upon this ground that the remedy has been applied from an early day, indeed, since the organization of courts and the admission of attorneys to practice therein down to the present time, to correct the abuses of the inferior courts in summary proceedings against their officers, and especially against the attorneys and counsellors of the courts. The order disbarring them, or subjecting them to fine or imprisonment, is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of mandamus, however flagrant the wrong committed against these officers, they would be destitute of any redress. The attorney or counsellor disbarred from caprice, prejudice, or passion, and thus suddenly deprived of the only means of an honorable support for himself and family, upon the contrary doctrine contended for, would be utterly remediless." (7 Wall., 376. See also *Ex parte* Robinson, 19 Wall., 506; The People *vs.* Turner, 1 Cal., 144.)

The circuit and district courts of the United States are empowered by act of Congress, to punish any officer of said courts for "misbehavior in their official transactions." The act limits the power of these courts to three classes of cases, specified in the act, and the power of these courts in the punishment of contempts can only be exercised in these

three classes of cases. Revised Statutes § 725; *Ex parte* Robinson, 19 Wall., 511.

The power to disbar an attorney proceeds upon different grounds, and is possessed by all courts which have authority to admit attorneys to practice. "But this power," say this court in *Ex parte* Robinson, *supra*, "can only be exercised where there has been such conduct on the part of the parties complained of as shows them to be unfit to be members of the profession. Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character, and sufficient learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications, both in character and learning. They become, by such admission, officers of the court, and as said in *Ex parte* Garland, 4 Wall., 378, 'they hold their office during good behavior, and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court after opportunity to be heard has been afforded.'"

In the case cited Mr. Robinson was an attorney of the court, who had been ordered by the court to show cause why he should not be punished as for a contempt, for the reasons set forth in the citation. Mr. Robinson appeared in court, and being reminded by the judge of the rule against him, replied, "Yes, sir; I know it, and I am here to respond," &c. The court required him to answer in writing, which he declined to do, and thereupon immediately the judge ordered the clerk to strike Mr. Robinson's name from the roll of attorneys, and the marshal to remove him from the bar. This court issued a peremptory mandamus requiring the judge of the court below to vacate the order disbarring Mr. Robinson, and to restore him to his office. It becomes a matter of consideration, then, to ascertain what this court meant by "an opportunity to be heard." Clearly, if the attorney is charged with a crime, "that he must be first

convicted of the crime by a jury of his country" before the court can proceed to disbar him for such offense.

Chief Justice Sharswood, delivering the opinion of the court in *Ex parte* Steinman and Hensel, 95 Pa. State Reports, 237, says: "No question can be made of the power of a court to strike a member of the bar from the roll for official misconduct in or out of court. By the seventy-third section of the act of April 14, 1834, (Pamph. L., 354,) it is expressly enacted that if any attorney-at-law shall misbehave himself in his office of attorney, he shall be liable to suspension, removal from office, or to such other penalties as have heretofore been allowed in such cases by the laws of this Commonwealth. We do not mean to say—for the case does not call for such an opinion—that there may not be cases of misconduct not strictly professional which would clearly show a person not to be fit to be an attorney, nor fit to associate with honest men. Thus, if he was proved to be a thief, a forger, a perjurer, or guilty of other offenses of the *crimen falsi*. But no one, we suppose, will contend that for such an offense he can be summarily convicted and disbarred by the court without a formal indictment, trial, and conviction by a jury, or upon confession in open court. Whether a libel is an offense of such a character may be a question, but certain it is that if the libel in this case had been upon a private individual, upon a public officer, such even as the district attorney, the court could not have summarily convicted the defendants and disbarred them. The office of an attorney is his property, and he cannot be deprived of it unless by the judgment of his peers or the law of the land, this last phrase meaning, as we have been taught by Lord Coke, 'due process of law.'"

In the case at bar the judge of the circuit court, in the most summary manner, upon the indefinite and uncertain testimony of one witness, has adjudged Mr. Wall guilty of one of the highest crimes, and upon such conviction has proceeded to disbar him. To say the most concerning the tes-

timony, even had the witness who was examined, sworn positively to the facts charged against Mr. Wall, it would have then been evenly balanced, for Mr. Wall, upon his oath as an attorney, filed his answer, in which he denied fully and explicitly the charges preferred against him by the court.

The writ of mandamus should be awarded.

C. W. JONES,
for the Petitioner.

SUPREME COURT U.S.
FILED
JAN 1 1883
JAMES H. McKENNEY, CLERK
17-266

Supreme Court of the United States.

OCTOBER TERM, 1882.

Ex parte J. B. WALL.

Petition for Mandamus.

C. W. JONES,
For the Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1882.

Ex parte J. B. WALL.

Petition for Mandamus.

PETITIONER'S BRIEF IN REPLY.

The respondent, Hon. James W. Locke, United States District Judge for the southern district of Florida, has made return to the rule and submitted the points that were considered by him and influenced him in rendering the judgment disbarring the petitioner.

Fields' case (1 Martin & Yerger, 168) was that of a constable who had been indicted and convicted of extortion, and, upon motion, the same court, after conviction, suspended him from office. An appeal was taken from both the judgment of conviction and the order of suspension, and the appellate court, in rendering its judgment in the latter matter, says the lower court was "well warranted in suspending the defendant in error, Fields, from the exercise of his office of constable *after his conviction for extortion*, and an appeal taken therefrom until the case of the State against him upon the indictment was determined in the court above." The opinion in the case had been prepared by Mr. Justice Catron, at a former term, but, after a reargument, that learned justice, at the time of delivering the opinion, announced the concurrence of the justices then sitting with

Supreme Court of the United States.

OCTOBER TERM, 1882.

Ex parte J. B. WALL.

Petition for Mandamus.

PETITIONER'S BRIEF IN REPLY.

The respondent, Hon. James W. Locke, United States District Judge for the southern district of Florida, has made return to the rule and submitted the points that were considered by him and influenced him in rendering the judgment disbarring the petitioner.

Fields' case (1 Martin & Yerger, 168) was that of a constable who had been indicted and convicted of extortion, and, upon motion, the same court, after conviction, suspended him from office. An appeal was taken from both the judgment of conviction and the order of suspension, and the appellate court, in rendering its judgment in the latter matter, says the lower court was "well warranted in suspending the defendant in error, Fields, from the exercise of his office of constable *after his conviction for extortion*, and an appeal taken therefrom until the case of the State against him upon the indictment was determined in the court above." The opinion in the case had been prepared by Mr. Justice Catron, at a former term, but, after a reargument, that learned justice, at the time of delivering the opinion, announced the concurrence of the justices then sitting with

him, simply in the principle above stated, and the case can therefore, only be cited as authority to that extent.

The case of Smith *vs.* State (1 Yerger, 228) was one instituted by one of the circuit judges under the act of the Tennessee Legislature of November 1, 1815, which provides that if any person shall prefer to the judge of any circuit court, or to either of the judges of the court of errors and appeals, a charge in writing against any attorney of any misdemeanor, the judge shall furnish such attorney with a copy of the charge alleged against him, and cite him to appear. It confers power upon such judge to investigate the charge, and secures the right of appeal to the court of errors and appeals. The charge against Mr. Smith, was that of murder in a duel, for which, it was alleged, an indictment had been found in a foreign State. The court, in discussing the statute and the reasons which influenced the Legislature in its passage, say:

"This act is broad in its terms—the design of the Legislature, so far from abridging the powers of the courts in the control of the profession, evidently intended enlargement—'and if upon investigation it shall appear to the satisfaction of the judge that such attorney has been guilty of any *misdemeanor* which ought to disqualify him from practicing as an attorney, it shall be the duty of the judge before whom, &c., to strike his name from the rolls; and it shall not be lawful for such attorney so disgraced to practice as such in any court of record in this State.'

"This act gives a very *unlimited* discretion to the judge, and the makers of this law well knew the characters of some of those the court might have to deal with, for while to the honor of the profession be it spoken, a large majority, by adherence to duty, did honor to their privileges, there were found amongst them, now and then, such as require the strong arm of the law to restrain from those acts of impropriety and violence, which pointed them out as unworthy of stations, which brought them into so near a relation with the administration of justice.

"*The Legislature knew that* law administered in the usual form is tardy, and any course short of special ministration

would lose much of its beneficial effects. The mazy round of special pleadings, miscarriages before juries, and delays incident, afford a labyrinth for the wiley to take shelter, if not escape; therefore, it is not deemed prudent to allow one so charged the right to demand forms of trial directly calculated to defeat *the very purposes of the act, namely, a speedy riddance of an obnoxious member of the bar.*"

The learned judge below, in his opinion in this matter, as published in the Federal Reporter, November 21, 1882, quotes the last paragraph, omitting the portion which I have put in italics. It is respectfully submitted that by the omission the meaning of the court is perverted. If there had been no statute in Tennessee authorizing "special ministration" the case would have been subjected to the "mazy round of special pleadings, miscarriages before juries, and delays incident;" in other words, to the "law, administered in the usual form."

In the matter of Moore and others (63 N. C., 405) the court refer to cases of attorneys being tried and convicted of forgery and other infamous crimes, and say:

"*These cases presuppose trial and conviction* for an offense where the court has no further concern than to preserve the purity of the bar. But the power and jurisdiction of the court apply with equal clearness to cases where the integrity of the court itself is assailed by a libellous publication made by a combination of a part of its bar. * * Under these circumstances the principle of self-protection, the broad ground on which the whole doctrine rests, calls into action the powers of the court as soon as there is *prima facie* evidence of the fact, without waiting for a trial and correction in another court—like the case of a mutiny among a crew.

Here we have the distinction clearly and forcibly stated between the cases in which a trial and conviction are necessary and those in which a court can proceed without waiting for a trial and conviction.

Chief Justice Pearson, in Haywood's case, (66 N. C., 32,) in delivering the opinion of the court, says:

"There is no doubt that a party may be doubly dealt with, and sometimes trebly. For instance, if an attorney committs murder in the presence of the court, he may instantly be fined and imprisoned for this contempt, he may be indicted, convicted, and executed, *and, before execution*, his name may be struck from the roll, after the manner of chivalry, when the spurs of a knight attainted were struck off before execution, to the end that the order might not be put in disrepute by his suffering a disgraceful death while he was a knight."

In Kirke's case, (12 Fla., 278,) Kirke, as judge of the county court of Escambia county, struck the name of I. Dennis Wolfe, an attorney of the court, from its roll of attorneys. Wolfe filed a transcript of the record of the judgment of the county court, containing the evidence there introduced, in the supreme court of the State, and a petition praying an alternative writ of mandamus. The supreme court granted the writ. Kirke made his return, in which he claimed the right as judge of the county court of Escambia county, upon the facts apparent upon the record, to disbar the said Wolfe. Upon the hearing, the supreme court, with respect to the question of the power of the county court, say:

"We are of the opinion that there is no want of power in the county court, in a proper case, and, upon proper proceedings, to disbar one of its attorneys."

With respect to their power to review or control the action of the lower court, and the manner in which their power should be invoked, they say:

"We do not doubt our power to exercise control over inferior courts in matters of this character in certain cases, nor that the manner of proceeding in this case is correctly conceived;" citing many authorities.

The supreme court of Massachusetts, (7 Cush., 239,) when in argument it was insisted that the writ of mandamus could not de claimed as a right, said :

"The application is to the discretion of the court. But this is not an arbitrary discretion; it is a judicial discretion. And where there is a right, and the law has established no *specific remedy*, this writ should not be denied. This writ was granted only to prevent a failure of justice, and is no doubt more freely and frequently granted at the present time than it was formerly."

See In the matter of Eldridge, (82 N. Y., 161,) where the court say, "that while the measure of punishment consequent upon a conclusion of guilt may fairly be said to be within the discretion of the immediate tribunal, the conclusion itself, the adjudication of guilt or innocence upon the facts, is not so far the subject of discretion as to be beyond review."

The most of the cases found in the books in which proceedings have been taken to disbar attorneys have originated in *official* misconduct of the parties; and generally the proceedings have been based upon the statutes of the several States in which they were had. The charges of crimes or misdemeanors, as the case may be, grew out of the conduct of the attorneys in connection with cases in which they were employed officially. The statutes, in most instances, confer jurisdiction, either upon the court or the judge, to hear and determine such matters. And where the crime or misdemeanor charged against the attorney grew out of his action in connection with his professional duties, the courts have generally held that a previous conviction was not necessary to justify the court in rejecting him from the bar. But in cases where the crime or misdemeanor charged against the attorney, grew out of transactions entirely disconnected with his official duties—was neither a breach of the rules of the court nor a breach of any of his official duties—the usual practice has been to

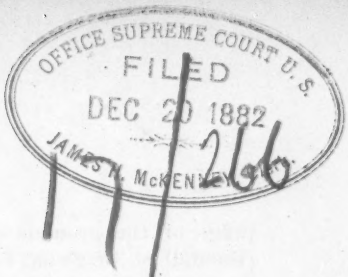
dismiss the complaint when the attorney denied the charge against him, because, in the language of Chief Justice Pearson, "these cases presuppose trial and conviction for an offense where the court has no further concern than to preserve the purity of the bar."

The attorney's official misconduct may fall short of a crime or misdemeanor, yet it may show his unfitness to be a member of the bar. Mr. Justice Miller, in *ex parte* Cole, (1 McCrary, 407,) says:

"The proceeding against the respondent in this case is neither an indictment nor information for an offense against the criminal code of the State or of the United States. The matters with which he is charged are not made an offense by any act of Congress, and this court possesses no power to try a man for any crime or misdemeanor at common law. It is not, therefore, a prosecution for any crime or misdemeanor known to the law."

It was a case of official misconduct in connection with a case pending in court, and the court took jurisdiction.

C. W. JONES,
For the Petitioner.



In the Supreme Court of the United States.

IN THE MATTER OF J. B. WALL. PETITION FOR MANDAMUS.

RESPONDENT'S BRIEF.

Petition for writ of mandamus.

Supreme Court of the United States.

In the matter of J. B. Wall, attorney at law.

To the honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent herein, having been summoned to show cause why an order made by him, prohibiting J. B. Wall from practicing as attorney should not be revoked, and being prevented by official duties from being heard in person, and by lack of time from employing counsel, would respectfully submit a few points that were considered by him, and influenced such judgment.

No court is bound to await the complaint of a third party before investigating any matter touching the misconduct of its officers, when information considered sufficient is received, and the circumstances, in its judgment, demand its interposition. The court alone is to

judge of the grounds upon which a rule may issue. (Randall *vs.* Brigham, 7 Wall., 523.)

Although English courts have declined to take summary action against attorneys because the offense charged has been an indictable one, all such cases seem to have been stated and considered as within the discretion of the court (3 Nev. & P., 389; 5 Barn. & Ald., 1088; Dowl. P. C., 110; King *v.* Southerton, 6 East., 27), and the practice of delaying proceedings in such cases until conviction has never been accepted by American courts, *Anon.* (2 Halst., 163) being the only case found where judgment has been refused on that ground. On the contrary in *In re* Hirst. & Ingersoll (9 Phila. 206), although the court remarked that "the offense charged—subornation of perjury and conspiracy against justice—is within reach of an indictment," it made the rule absolute, dismissing one party and suspending the other during the existence of the court. In Smith *vs.* State (Yerger, 228), it was held that a conviction was not necessary before a proceeding to disbar an attorney; and in Field's case (1 Martin and Y.), where the power of courts to remove officers was under consideration, the court said:

> By change of venue and writs of error the criminal could easily have kept off the punishment for two years, and by this means put himself above the law, if the court had not the power of removal. The conviction, when produced, would only be evidence of the facts alleged, and these facts the court have for this purpose as much right to inquire into as the jury.
>
> In this country it would most probably be unconstitutional to inflict punishment upon the person of the offender, otherwise than by conviction upon indictment; but the removal from office being a civil proceeding not affecting the person, and being no bar to an indictment for the same offense, the finding of a jury is not necessary to authorize the court to remove.

The Supreme Court of New Hampshire, in Delano's Case (58 N. H., 5, advance sheets), took a similar view of the law by disbarring an attorney for an indictable offense without conviction.

In this proceeding against Mr. Wall the United States circuit court had unquestionable jurisdiction, but in a criminal prosecution for the offense charged it had none.

"The end to be attained is not punishment, but protection," (Austin's Case, 5 Rawles, 204) and if the courts of the United States are compelled to wait in their action the decision of a foreign tribunal, they are helpless throughout an entire district, State, or circuit, against local prejudice, or the prejudice, inactivity, negligence, or timidity of the prosecuting officers or jurors of any one county.

It was objected to the final order, after its entry, that "it suspended the defendant indefinitely."

If the court has not erred in its judgment, a positive order of expulsion would have been allowable, and where action is taken that is usually the judgment pronounced, and a suspension, although indefinite, cannot be held to exceed a final disbarring. As the right of such judgment is based upon a declared unfitness of the party to hold the position of attorney, and not upon the idea of a penalty or punishment for any act committed, a definite suspension, to be terminated by the readmission of the party suspended unconditionally, may argue rather a desire to punish than a declaration regarding the character of an attorney, and be subject to criticism, although such was approved in Burr's Case (9 Wheaton, 529); but an indefinite suspension, which only differs from a total expulsion in embodying an expression of a